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No. _____

In The

Supreme Court of the United States

October Term, 1997

KEITH BUCK,

Petitioner,

v.

FRIES & FRIES, INC. AND HERCULES FLAVOR, INC., D/B/A TASTEMAKER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

SHOULD THE DUTY TO ACCOMMODATE A "REGARDED AS" DISABLED EMPLOYEE WITHIN THE MEANING OF THE AMERICANS WITH DISABILITIES ACT ENCOMPASS A DUTY TO AFFORD HIM AN OPPORTUNITY TO UNDERGO PARTICULARIZED ON-SITE TESTING AT HIS PLACE OF EMPLOYMENT IN ORDER TO DEMONSTRATE THAT HE CAN PERFORM THE ESSENTIAL ELEMENTS OF HIS JOB?

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 2

STATEMENT OF CASE 2

QUESTION PRESENTED FOR REVIEW 11

SHOULD THE DUTY TO ACCOMMODATE A "REGARDED AS" DISABLED EMPLOYEE WITHIN THE MEANING OF THE AMERICANS WITH DISABILITIES ACT ENCOMPASS A DUTY TO AFFORD HIM AN OPPORTUNITY TO UNDERGO PARTICULARIZED ON-SITE TESTING AT HIS PLACE OF EMPLOYMENT IN ORDER TO DEMONSTRATE THAT HE CAN PERFORM THE ESSENTIAL ELEMENTS OF HIS JOB? 11

ARGUMENT 11

CONCLUSION 26

APPENDIX ..... App. 1

Decision of the Court of Appeals for the Sixth Circuit, *Buck v. Fries & Fries, Inc.* ..... App. 1

Decision of the U.S. District Court for the Southern District of Ohio, Western Division, *Buck v. Fries & Fries, Inc.* ..... App. 14

Applicable Statutory and Regulatory Provisions ..... App. 44

TABLE OF CONTENTS – Continued

Page

Tastemaker Interoffice Memorandum to Keith Buck from Anthony Dennis dated August 20, 1992 .....App. 48

Letter from Dr. Ann Middaugh to Michael E. Conner dated May 4, 1993.....App. 51

Page 6 of letter from Edwin T. Barrett Jr., Ph.D. to Dr. Ann Middaugh dated April 22, 1993.....App. 53

Bethesda Rehabilitation Plan for Dr. Buck....App. 54

Page 3 of letter from Michael F. Hartings, Ph.D. to Dr. James J. Anthony dated September 23, 1993 .....App. 55

Page 3 of Independent Medical Examination by Dr. Michael W. O'Dell on Keith Buck dated January 4, 1994.....App. 58

Letter from Donald B. Hordes to Dr. Anthony J. Dennis dated May 4, 1994.....App. 60

Page 11 of report on Dr. Keith Buck by Donna B. Taylor dated December 23, 1993 .....App. 63

Letter from Donna Taylor to Wendy Gimbel dated June 30, 1994 .....App. 66

Letter from Donna Taylor to Wendy Gimbel dated August 30, 1994.....App. 70

Letter from hans Zimmer Ph.D. to Donald B. Hordes dated August 21, 1995.....App. 72

Excerpts from deposition of Michael Conner....App. 76

TABLE OF AUTHORITIES

Page

CASES

Beck v. University of Wisconsin Board of Regents, 75 F.3d 1130 (7th Cir. 1996) 23

Buck v. Fries & Fries Inc., No. C-1-94-555 (S.D. Ohio, Dec. 29, 1996) 1

Cook v. State of Rhode Island Dep't of Mental Health, 10 F.3d 17 (1st Cir. 1993) 17

Deane v. Pocono Medical Center, ___ F.3d ___, 1998 U.S. App. LEXIS 7622 (3rd Cir. *en banc* 1998), rev'g a panel decision in 1997 U.S. App. LEXIS 22606 (3d Cir. 1997) 19, 23

EEOC v. The Chrysler Corp., 5 AD Cases 517 (E.D. Mich. 1996) 19

EEOC v. Texas Bus Lines, 923 F.2d 965 (S.D. Tex. 1996) 20

Jacques v. Clean-Up Group, Inc., 1996 U.S. App. LEXIS 24661 (1st Cir. 1996) 23

Katz v. City Metal Co., Inc., 87 F.3d 26 (1st Cir. 1996) 18

Kocsis v. MultiCare Management, Inc., 97 F.3d 876 (6th Cir. 1996) 10

School Board of Nassau County v. Arline, 480 U.S. 273, 94 L.Ed.2d 307, 107 S.Ct. 1123 (1987) 15, 16, 21, 25

Taylor v. Principal Financial Group, 93 F.3d 155 (5th Cir. 1996) 23

White v. York Int'l Corp., 45 F.3d 357 (10th Cir. 1995) 23

TABLE OF AUTHORITIES – Continued

Page

STATUTORY AUTHORITIES

The Americans With Disabilities Act of 1991,
28 U.S.C. § 1331 9
28 U.S.C. § 1367 10
29 U.S.C. § 701 15
42 U.S.C. § 12101(b) 2
42 U.S.C. § 12102(2) 2, 13
42 U.S.C. § 12111(9) 2
42 U.S.C. § 12112(a) and (b) 2, 12, 14

RULES

29 C.F.R. § 1630(l) 2, 13, 14
Federal Rules of Civil Procedure 18(a) 10

PETITION FOR A WRIT OF CERTIORARI

Petitioner requests that a Writ of Certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Sixth Circuit entered on April 3, 1998, which affirmed a ruling by the United States District Court for the Southern District of Ohio, Western Division, on December 29, 1996 granting Respondents' Motion for Summary Judgment.

OPINIONS BELOW

The opinion of the United States Court of Appeals is contained in the Appendix at App. 1. It has not been recommended for full text publication. The opinion of the Judge of the United States District Court for the Southern District of Ohio, Western Division, is contained in the Appendix at App. 14, and is not reported. It is cited as *Buck v. Fries & Fries Inc.*, No. C-1-94-555 (S.D. Ohio, Dec. 29, 1996).

JURISDICTION

The opinion of the Court of Appeals to be reviewed was entered on April 3, 1998. Jurisdiction to review the judgment of the United States Court of Appeals for the Sixth Circuit in this cause, by Writ of Certiorari, is conferred on this Court by 18 U.S.C. § 1254(1).

STATUTES INVOLVED

The Americans With Disabilities Act of 1991, 42 U.S.C. § 12101 *et seq.*;

42 U.S.C. § 12101(b);
42 U.S.C. § 12102(2);
42 U.S.C. § 12111(9);
42 U.S.C. § 12112(a) and (b);
29 C.F.R. § 1630(1).

The text of these provisions is set forth in the Appendix to this Petition.

STATEMENT OF THE CASE

Respondents are engaged in a partnership to manufacture natural and synthetic flavors for the food and beverage industry out of its Cincinnati, Ohio facility. Petitioner, Dr. Keith Buck, was hired by Respondents in 1979 as a Ph.D. research bench chemist. He rose through the ranks to become a senior research bench chemist. During his employment he was highly regarded as a competent and innovative bench chemist.

In the fall of 1991, Dr. Buck, while on a business trip in Columbus, Ohio, fell and hit his head on a sidewalk. As a result, he suffered a subdural hematoma which immobilized him for several weeks. Later in November of 1991, Keith Buck returned to work, although he was still laboring under the residual effects of his brain injury. Throughout the first few months back on the job, he

experienced memory losses as well as physical unsteadiness in his hands and gait. Until June of 1992, Respondents, owing to these difficulties, restricted Petitioner to desk work.

However, during this period of time, Dr. Buck's condition gradually but steadily improved. He began questioning his supervisors as to when he might return to do bench work in his laboratory. In June of 1992, Dr. Buck's immediate supervisor, Dr. Anthony Dennis, Respondents' Director of Research, devised a five-step proposal for Dr. Buck to complete to determine whether he was intellectually and physically fit to return to the laboratory and perform bench chemistry. The first four stages were designed to measure Dr. Buck's intellectual capabilities to devise and plan experiments. The final stage, stage 5, was to measure Dr Buck's physical skills in the laboratory, i.e., handling chemicals, flasks, beakers, burners and other laboratory paraphernalia. Dr. Buck worked on this proposal throughout the summer of 1992 and, by Dr. Dennis' own admission, successfully completed the first four steps of the proposal, thereby demonstrating his intellectual ability to do bench chemistry. However, based on his perception of Dr. Buck's physical unsteadiness, Dr. Dennis forbade Dr. Buck from performing hands-on bench chemistry. (App. 48).

During the winter of 1992-1993, Respondents began exploring the notion of placing Dr. Buck on short term disability. To this end, they retained occupational medicine physician, Dr. Ann Middaugh, to evaluate Dr. Buck's physical and mental capability to perform bench chemistry. Dr. Middaugh did not spend any significant amount

of time observing Dr. Buck performing a sample experiment. At most, she observed him for 20 to 30 minutes as he was walking around in the laboratory not doing anything particular at the time. Dr. Middaugh's primary evaluative effort was to have Dr. Buck come to her office wherein she administered a series of paper-and-pencil psychometric tests, as well as tests measuring his physical agility. She also referred Dr. Buck to a neuropsychologist, Dr. Edwin Barrett, for an independent evaluation.

On May 4, 1993, Dr. Middaugh issued to Respondents her final report (App. 51) in which she concluded that Dr. Buck lacked the intellectual and memory skills to do the careful sequencing of experiments and thus concluded that he should be permanently restricted from bench chemistry. The referral neuropsychologist, Dr. Barrett, also issued a report. While he concurred with Dr. Middaugh's empirical findings, he stated:

> "Unfortunately what we find in our laboratory does not always generalize perfectly to work settings . . . The ultimate criterion as to whether he can function as a bench chemist is to assign a job coach who can closely observe and work with Dr. Buck in the laboratory for a trial period. (App. 53).

In the wake of Dr. Middaugh's Report, Respondents, on May 27, 1993, unilaterally placed Dr. Buck on short term disability leave against his will. The short term disability was converted to long term disability in November of 1993. Dr. Buck remained on long term disability from November of 1993 until November of 1995. On November 23, 1995, the Respondents' long term disability carrier, UNUM, terminated his benefits because, in

its judgment, Dr. Buck possessed transferable skills for jobs other than bench chemistry. Concurrently, Respondents terminated Dr. Buck on the basis that he was unable to return to work as a bench chemist.

Dr. Buck had long been upset over the fact that he had been placed on disability back in May of 1993 without ever being given the opportunity to demonstrate his intellectual and physical prowess on the bench in his old chemistry laboratory. Therefore, in the ensuing several months, Dr. Buck consulted with a number of physiologists and neuropsychologists so as to determine his physical abilities on the bench and whether he needed further rehabilitation. As noted below, each and every one of these doctors and neuropsychologists wrote reports that were made available to Respondents that Dr. Buck should be given an opportunity to work in the lab, with or without a job coach to demonstrate his abilities, or at a minimum, to determine what, if any, accommodations he might need after the tests were done:

1. In the summer of 1993, Dr. Buck consulted with Dr. Joseph Schroeder, a physiatrist, who formulated a comprehensive rehabilitation plan for review by Respondents. The rehabilitation plan stated,

> With the assistance of his employer, Dr. Buck will demonstrate his competence in the above. We will ask the employer to provide a sample project which will require Dr. Buck to fulfill the above requirements. The employer will be asked to provide specific feedback regarding Dr. Buck's performance as it relates to the above tasks.

(App. 54-55). Respondents did not respond to Dr. Schroeder's rehabilitation plan.

2. On September 23, 1993, Dr. Buck consulted with another neuropsychologist, Dr. Michael F. Hartings. Dr. Hartings issued a report basically echoing the opinion of his fellow neuropsychologist, Dr. Edwin Barrett:

> As well noted in Dr. Barrett's report, the ecological validity of psychometric tests, especially in highly functional and educated individuals, may be less than optimal. He may be able to do things on site which could not be predicted on the basis of these data. . . . Therefore, I concur with Dr. Barrett that a trial at his former job, with appropriate coaching or assistance, would certainly be worthwhile.

(App. 57). Again, Respondents did not respond to the suggestions of Dr. Hartings.

3. In January of 1994, Dr. Buck consulted with another physiatrist, Dr. Michael W. O'Dell.[1] After examining Dr. Buck, Dr. O'Dell also issued a report which was subsequently given to Respondents. It said:

> "I concur with the other evaluators . . . that an on-site evaluation at Dr. Buck's former job is not unreasonable. I would suggest that this would be done with a job coach or otherwise qualified person supervising his performance in the lab setting."

(App. 58-59).

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[1] Dr. O'Dell's Opinion was particularly authoritative in that he has extensive background and experience in treating patients with traumatic brain injuries like the one suffered by Petitioner. He is, in fact, the Director of Brain Injury Rehabilitation at the University of Cincinnati.

At no time during Dr. Buck's disability period did Respondents respond to or act upon Dr. O'Dell's recommendation.

4. Dr. Buck's own undersigned counsel wrote a letter to Respondents' Director of Research, Anthony Dennis, in May of 1994 bringing to Dr. Dennis' attention the report and recommendation of the aforesaid neuropsychologist, Edwin Barrett, and offering the following proposal:

> "I would like to work out an arrangement whereby Tastemaker would put Dr. Buck back on the payroll immediately and be examined by an independent occupational specialist mutually acceptable to both sides. This doctor would conduct appropriate studies to determine whether Dr. Buck can do his job with or without reasonable accommodations."

(App. 62). Dr. Dennis did not respond to Petitioner's undersigned counsel.

5. Dr. Buck's pleas for an on-site evaluation at his old laboratory was validated by Defendant's own expert witness, Donna Taylor, a Licensed Professional Counselor. After undertaking a lengthy interview of Dr. Buck in December of 1993 on behalf of UNUM, she issued a report stating that the preferred method of determining whether Dr. Buck had recovered from his brain injury to the point that he could resume his prior bench responsibilities would be a closely supervised trial work period in Respondents' own laboratory. (App. 64). Respondents did not act upon even the recommendations of the consultant for their own disability insurance carrier, UNUM.

When the company refused to make its lab available, Ms. Taylor attempted to have Dr. Buck evaluated at other organic chemistry laboratories throughout the city but was unsuccessful in finding one which was willing to conduct such an evaluation. (App. 66-72).

6. After receiving no help or support from either Respondents or their disability carrier UNUM, Dr. Buck took matters in his own hands and, in the summer of 1995, arranged to be tested at an organic synthesis laboratory at the University of Cincinnati under the auspices of Dr. Hans Zimmer, an organic synthesis Ph.D. chemist. He selected Dr. Zimmer because the work that he was doing replicated as closely as possible the type of organic chemical synthesis work that was being done at Respondents' laboratories. Dr. Zimmer proposed a chemistry problem worthy of a Ph.D. chemist. After Dr. Buck did the literature search and demonstrated to Dr. Zimmer's satisfaction sufficient intellectual ability to devise a proper plan for conducting the experiment, Dr. Zimmer admitted Dr. Buck to work in his laboratory where he worked for several weeks. At the end of this demonstration period Dr. Zimmer issued a lengthy report in which he stated:

> "Dr. Buck proved to me that he is a competent chemist; that he could do synthetic sequence; that he works safely, obeying all safety regulations; and best of all, if the reaction did not give the expected result, he digs in and finds out what actually happened. *Thus, in my opinion, he did solid work with me and I have no doubts whatsoever that given the opportunity he will perform on a Ph.D. level in a lab and in obtaining background literature work for high caliber chemical synthesis.*

(App. 75) (Emphasis added).

During his deposition he also stated that Dr. Buck did not exhibit any physical unsteadiness or forgetfulness.

Upon receipt of this report, Plaintiff's counsel immediately forwarded a copy to counsel for Respondents. However, notwithstanding all of this, Respondents gave no weight to Dr. Zimmer's report, ignored his recommendations and still refused to return Dr. Buck to the lab, either on a trial basis or otherwise.

Ignoring the reports and recommendations of all of these expert witnesses, and relying solely on the input of Dr. Middaugh, who never observed Dr. Buck performing meaningful work in the lab, Respondents discharged Dr. Buck on November 23, 1995. Respondents' failure to act on any of these reports was not due to inadvertence or oversight. Defendant's Director of Human Resources, Michael Conner, testified in his deposition that Respondents deliberately refused to deal with any of Dr. Buck's doctors because Dr. Buck had earlier filed EEOC charges thus putting him and Respondents in an "adversarial" relationship. (App. 76).

Petitioner filed his original Complaint in the United States District Court for the Southern District of Ohio, Western Division, on August 11, 1994, alleging, *inter alia*, that he was "regarded as" disabled and that Respondents failed to accommodate him by offering him an opportunity to demonstrate his abilities on a trial basis in his old laboratory with or without independent evaluation. The action was properly heard by the United States District Court pursuant to 28 U.S.C. § 1331 in that this action presented a federal question arising under the laws of the

United States, specifically 42 U.S.C. § 12101 *et seq.* Pendant state claims were properly heard pursuant to 28 U.S.C. § 1367 and Federal Rules of Civil Procedure 18(a).

After lengthy discovery by both parties, Respondents filed a Motion for Summary Judgment seeking dismissal of all of Petitioner's discrimination claims. On December 29, 1996, the District Court granted Respondents' Motion for Summary Judgment.

Petitioner filed a timely appeal to the United States Circuit Court of Appeals for the Sixth Circuit. On April 3, 1998, the Sixth Circuit panel hearing the case affirmed the District Court's granting of summary judgment.

The Sixth Circuit correctly cited the Americans With Disabilities Act (ADA) as prohibiting discrimination against a qualified individual with a disability with regard to hire, discharge and terms and conditions of employment. The Sixth Circuit also correctly ruled that Petitioner, in order to establish a *prima facie* case of disability discrimination, must satisfy the burden of demonstrating that he is qualified to perform essential elements of his job with or without reasonable accommodations. *See Kocsis v. MultiCare Management, Inc.*, 97 F.3d 876 (6th Cir. 1996). However, the Sixth Circuit squarely rejected Petitioner's argument, holding that when a "regarded as disabled" employee, seeks the protection of the ADA, the concept of "accommodation" is non-germane to the inquiry. The Court specifically noted that offering the Plaintiff an opportunity to undergo particularized testing to demonstrate his skills on the job did not constitute an appropriate accommodation as contemplated by the ADA. (App. 10). "because it does not serve to enable an

employee to perform his job – it only helps to determine whether the employee is capable of performing his assigned tasks." (App. 10). The Sixth Circuit concluded with a general proposition of law that whenever an individual is discharged or refused hire because his employer regards him as disabled, the individual must be left to his own devices without any cooperation from his employer to somehow prove he was otherwise qualified.

QUESTION PRESENTED FOR REVIEW

SHOULD THE DUTY TO ACCOMMODATE A "REGARDED AS" DISABLED EMPLOYEE WITHIN THE MEANING OF THE AMERICANS WITH DISABILITIES ACT ENCOMPASS A DUTY TO AFFORD HIM AN OPPORTUNITY TO UNDERGO PARTICULARIZED ON-SITE TESTING AT HIS PLACE OF EMPLOYMENT IN ORDER TO DEMONSTRATE THAT HE CAN PERFORM THE ESSENTIAL ELEMENTS OF HIS JOB?

ARGUMENT

Ever since the enactment of the Americans With Disabilities Act in 1991, federal courts have had numerous opportunities to address claims by plaintiffs that their employers failed to offer reasonable accommodations for their various disabilities which would allow them to perform the essential elements of their jobs. The plaintiffs present with specific impairments, e.g., blindness, difficulty hearing, difficulty ambulating, which prevent

them from performing their jobs unless the employer accommodates the employee by instituting ameliorative measures, e.g., braille keyboards, sound enhanced telephone receivers, wheelchair ramps, etc.

Though the specific facts of each case are different, the framework for analyzing these cases is the same.

Is the disabled employee otherwise qualified?

If so, was the requested accommodation reasonable?

Can the employer articulate an undue hardship which would excuse it from providing the accommodation?

If the employer refuses to make a reasonable accommodation, said denial constitutes unlawful discrimination prohibited by the ADA, 42 U.S.C. § 12112(b)(5)(A).

The instant case, however, presents a far rarer fact pattern, one where the plaintiff does not have a clearly identifiable impairment. Nor can he identify at this juncture, a particular accommodation which might be implemented to allow him to perform his job. This is a case where the plaintiff alleges he was discriminated against on the basis that he was "regarded as" disabled. While Petitioner admits that the residual effects of his subdural hematoma may constitute an impairment, he claims he can perform the job, and demands the opportunity to prove it, but his employer will not let him. Were he given an opportunity to demonstrate on a trial basis that he could perform his job, he might have done so in such a satisfactory fashion that he would need no accommodation at all. Or, should he experience some difficulties

performing his job on a trial basis, the employee, employer and, if appropriate, some neutral evaluator, might collaborate to arrive at an accommodation which would enable the employee to surmount those difficulties. However, in this case, where the employer denies the employee the opportunity to demonstrate his abilities on-site under impartial observation, it is impossible to determine what, if any, accommodation is required.

The question Petitioner would thus place before this Court is how does one define an employer's duty to accommodate an employee who is "regarded as" disabled? The literal wording of the statute provides substantial guidance. 42 U.S.C. § 12102(2) defines a "disabled employee within the meaning of the Act as including individuals who are "regarded as" disabled. (App. 44).

The Equal Employment Opportunity Commission (EEOC) has promulgated interpretive guidelines and rules embodied in 29 C.F.R. § 1630(1) which define who is "regarded as" disabled.

There are three ways in which an individual can establish that he is "regarded as" disabled:

(1) the individual has an impairment which is not substantially limiting but is perceived by the employer as constituting a substantial limiting impairment;

(2) the individual may have an impairment which is only substantially limiting because of the attitudes of others toward the impairment; or

> (3) the individual may have no impairment at all but is regarded by the employer or other covered entities as having a substantial limiting impairment.

29 C.F.R. § 1630(l). (App. 47).

Section 12112(a) of the ADA prohibits discrimination against qualified individuals with disabilities. Paragraph 12112(b) sets forth the various ways in which an employer discriminates. One of these is failure to make reasonable accommodations. Paragraph 5(A) of Section 12112(b) provides as follows:

> [An employer discriminates] by not making reasonable accommodations to the known physical or mental limitations of an otherwise-qualified individual with a disability who is an applicant or employee unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity. (App. 46).

"A qualified individual with a disability" has already been defined by the statute as including qualified individuals who are "regarded as" disabled. It would thus appear self-evident, at least through the literal wording of the statute, that an employer's duty to accommodate qualified individuals with disabilities includes the duty to accommodate individuals who are "regarded as" disabled as well.

However, the nature of such accommodation is problematic. The theory under which Plaintiff has been pursuing litigation in this case is that there does indeed exist a duty by the employer to accommodate an individual

regarded as disabled, and that accommodation takes the form of allowing the individual an opportunity to demonstrate his prowess on the job in the presence of outside neutral observers and evaluators, if necessary, to determine that he can, in fact, perform the essential elements of the job with or without further accommodation. This is the most effective, if not the sole, reasonable accommodation an employer is able to provide in such a situation.

The Sixth Circuit, however, squarely rejected this argument.

> Buck's theory that Tastemaker was required by the ADA's accommodation provisions to give him a particular type of testing to determine his qualifications, is simply incorrect. Providing particularized testing of an employee's qualifications is simply not an accommodation under the ADA, because it does not serve to enable an employee to perform his job – it only helps to determine whether the employee is capable of performing his assigned tasks.

The Sixth Circuit cited no legal authority for this position. In fact, no other court has ever squarely addressed and resolved this issue as to whether offering an opportunity to a regarded-as disabled employee to be tested on the job is an effective accommodation. However, the prior holdings of this Court and a number of federal circuit courts strongly suggest that faced with this question, they would rule that an on-the-job test would be a proper accommodation. *School Board of Nassau County v. Arline*, 480 U.S. 273, 94 L.Ed.2d 307, 107 S.Ct. 1123 (1987), a disability discrimination case brought under the Rehabilitation Act of 1973, 29 U.S.C. § 701, the

Supreme Court ruled unlawful the school board's refusal to reinstate a teacher who had a history of respiratory problems for fear of contaminating others, but who was, at the time of the refusal, no longer disabled. Noting that "society's accumulated myths and fears about disabilities and diseases are as handicapping as are the physical limitations that flow from actual impairment" (*Id.* at 284), the Supreme Court held that covered employers had an affirmative obligation to make reasonable accommodations for employees who are perceived to be handicapped. *Id.* at 287-288.[2]

Since the issue in *Arline* was the extent to which the plaintiff's disease posed a risk of contagion to others the Supreme Court stressed the need for a particularized medical inquiry and medical judgment by public health officials as to whether she was otherwise qualified to be a teacher. Only after this was done could an appropriate inquiry into reasonable accommodations take place.

> The next step in the "otherwise qualified" inquiry is for the court to evaluate, *in light of these medical findings*, whether the employer could reasonably accommodate the employee under the established standards for that inquiry.

Id. at 288 (emphasis added).

What the Supreme Court said in essence is that an accommodation may entail a two-step process, a medical

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[2] While *Arline* was decided under the Rehabilitation Act, that statute deals with the problem present in the case *sub judice*, i.e., discrimination by an employer against otherwise qualified disabled individuals. Therefore, the logic of *Arline* should be applicable here.

inquiry followed by a supplemental accommodation based on that inquiry, if necessary. This is precisely the position Petitioner would submit to this Court, one that has been rejected by the Sixth Circuit. Whether Dr. Buck can perform his job turns on an initial medical inquiry of his performance in his laboratory which can only take place with the employer's cooperation. Once that takes place, the second inquiry would be whether the Petitioner needed an accommodation, and, if so, what form the accommodation should take.

In *Cook v. State of Rhode Island Dep't of Mental Health*, 10 F.3d 17 (1st Cir. 1993), another Rehabilitation Act case, the First Circuit addressed the situation of a morbidly obese hospital attendant who was denied rehire because of her employer's generalized and stereotypical fears that she would be physically unable to perform the job, would constitute a danger to herself and others, and would be frequently absent due to her physical condition.

Without addressing the issue of accommodation *per se*, the Court condemned the employer's refusal to rehire her as violative of the Rehabilitation Act.

> "At trial MHRH failed to make specific inquiries in the plaintiff's physical abilities and instead relied on generalizations regarding an obese person's capabilities. This is a strict inverse of the *"fact-specific and individualized" inquiry, Arline, 480 U.S. at 287, that the Rehabilitation Act requires*. Indeed, appellant's "evidence" comprises a graphic illustration of an employment decision based on stereotyping – exactly the sort of employment decision that the Rehabilitation Act seeks to banish."

Id. at 27 (emphasis added).

Similarly, *Katz v. City Metal Co., Inc.*, 87 F.3d 26 (1st Cir. 1996), an ADA case, involved an otherwise-satisfactory traveling salesman who suffered a heart attack and was placed on disability for several months. During his recuperation the employer informed him that he was fired. The company later rejected the employee's offer to come to work on a part-time basis.

The First Circuit recognized that individuals perceived as disabled, just like individuals who are admittedly disabled, are entitled to accommodations.

> Congress, when it provided for perception to be the basis of disability status, probably had principally in mind the more usual case in which a plaintiff has a long standing medical condition of some kind and the employer exaggerates its significance by failing to make a reasonable accommodation. But both the language and the policy of the statute seem to us to offer protection as well as to one who is not substantially disabled or even disabled at all, but is wrongly perceived to be so. And of course it may well be that *Katz* was both actually disabled and perceived to be so.

Id. at 33.

The accommodation asked for by the plaintiff in *Katz*, i.e., return to work on a part-time basis, where he could, presumably, demonstrate his capabilities on a day-to-day basis, was recognized by the First Circuit as valid. *Id.* Therefore, the employer's steadfast refusal to provide such an accommodation placed it in violation of the Americans With Disabilities Act.

Deane v. Pocono Medical Center, ___ F.3d ___, 1998 U.S. App. LEXIS 7622 (3rd Cir. *en banc* 1998) rev'g a panel decision in 1997 U.S. App. LEXIS 22606 (3d Cir. 1997), involved a registered nurse who sustained a cartilage tear in her right wrist while lifting a patient, which necessitated her being off of work for one year. At the end of that year the Plaintiff offered to come back to work with restrictions that limited her only from performing the non-essential elements of the job. However, she could perform the essential elements of the job. The hospital, nonetheless, refused to bring the plaintiff back to work, regarding her as "handicapped". The Court ruled that a "regarded as" employee would be considered otherwise qualified under the ADA as long as she could perform just the essential elements of the job, not all of the elements of the job with or without accommodation. The Third Circuit held that "the ADA requires proof only of a plaintiff's ability to perform a position's essential functions." *Id.* at *3.

Deane further held that whether the employer was justified in failing to reinstate the plaintiff was a question that had to be resolved by a jury after determining whether she could perform the essential elements of the job.[3]

Other federal courts have been quick to condemn employers who either refuse to hire, or discharge, employees who are regarded as disabled. In *EEOC v. The*

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[3] The Court did, however, deliberately duck one of the questions presently before this Court, i.e., should "regarded as" disabled employees be entitled to accommodations if they could not otherwise perform the essential elements of their job. *Id.* at *29, footnote 12.

Chrysler Corp., 5 AD Cases 517 (E.D. Mich. 1996), the employer refused to hire a diabetic applicant for the position of electrician because the company doctor performed three blood/sugar tests on him which exceeded a certain level. The employer then made an arbitrary decision that the applicant was unqualified for the job based on its mere perception that he might pose a direct threat to himself and others. The court condemned the employer's refusal to hire the individual without undertaking an individualized assessment of his condition as violative of the ADA. In *EEOC v. Texas Bus Lines*, 923 F.2d 965 (S.D. Tex. 1996) at issue was the ability of an obese individual to work as a bus driver. The court found unlawful the employer's arbitrary rejection of the obese applicant, because the decision was made without the benefit of objective medical testings or findings other than a very limited medical examination by the company doctor. The court concluded that the applicant was rejected solely on the basis of a perceived disability, i.e., obesity, and not because she had actually failed an on-the-job bus driver test.

While none of these circuit and district court cases directly address the issue of whether a "regarded as" disabled employee should be accommodated by giving him an on-site test to demonstrate his ability to perform his job, a common thread running through all of these cases is a rejection of an employer's generalized stereotypical view of an individual's perceived disability in favor of a more individualized inquiry into his abilities and capacities. Thus there is a suggestion that such "regarded as" employees must be allowed access to the job site in order to demonstrate their ability to perform their jobs.

In this case, Petitioner argues that the only way he could prove that he was regarded as a disabled individual but otherwise qualified to perform his job as a bench chemist was to be given the opportunity to do just that, perform bench chemistry in his former laboratory. The decision of the Sixth Circuit rejecting such an opportunity would appear to run counter to the U.S. Supreme Court's decision in *Arline*, as well as the decisions from the other circuits cited, *infra*. By denying an employee the opportunity to prove himself in an on-the-job simulation and instead leaving him to his own devices to prove that he is otherwise qualified to perform the essential elements of his job, the Sixth Circuit decision eviscerates the protections accorded to "regarded as" disabled employees under the ADA.

To be sure, the burden to prove that one is "otherwise qualified" is not all that onerous in the case of an unskilled or manual employee. If an employer refuses to hire or reinstate a construction worker because it regards his back ailment as making it impossible for him to lift, say, 50 pounds, all the employee has to do is go to any neutral observer, or a work capacity center, to undergo testing and obtain verification that he in fact can lift 50 pounds. If an employer refuses to rehire a secretary who is suffering from carpal tunnel syndrome under the assumption that she could not type a certain number of words per minute over a certain length of time, she could easily meet her burden of showing she is "otherwise qualified" by demonstrating to a neutral observer that she can in fact meet the employer's performance goals.

However, high-functioning intellectual employees like Petitioner are not so fortunate. Dr. Buck performed

an esoteric brand of organic synthesis chemistry, in a uniquely equipped lab specifically dedicated to developing flavors and scents. It would be difficult for him to find another similar lab which would serve as an appropriate venue for demonstrating his capabilities as an organic bench chemist. The best solution to Petitioner's dilemma would be to allow him access to his former lab on the employer's premises to prove that he could still perform as a bench chemist. This is a solution that even Defendant's own rehabilitation expert deemed to be the most preferable. If an employer's duty to accommodate a "regarded as" employee like Dr. Buck is to have any meaning whatsoever, it would appear that such a duty to accommodate must encompass giving such an intellectual employee the opportunity to establish his "otherwise qualified" status on the job. It may very well be that such a test would show that the individual needs no help whatsoever and he could go right back to work without accommodation. Or, the on-job test might show less than optimal performance. Given the presence of a neutral job coach or rehabilitation specialist, a reasonable accommodation might be devised which would enable Petitioner to perform his job effectively.[4] However, without such accommodative cooperation by the employer in making the job site available for testing, educated employees like Dr. Buck have virtually no chance of proving that they are "otherwise qualified".

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[4] The *EEOC* would never have listed utilization of job coaches as an appropriate form of accomodation unless it anticipated the need to gauge the performance of employees returning to the work force from disability.

The Sixth Circuit's decision ruling out an on-job testing as an appropriate accommodation would also appear to run counter to the weight of the circuit courts elsewhere in the country which put a great deal of emphasis on the informal interactive nature of the accommodative dialogue. For instance, in *Deane v. Pocono Medical Center, supra,* the Third Circuit stressed the importance of the disabled employee and his employer working together cooperatively in exploring reasonable accommodations.

> [A]n employer who fails to engage in the interactive process runs a serious risk that it will erroneously overlook an opportunity to accommodate a statutorily disabled employee, and thereby violate the ADA.

1998 U.S. App. LEXIS 7622 at *31.

Similar sentiments were echoed by the Seventh Circuit in *Beck v. University of Wisconsin Board of Regents,* 75 F.3d 1130 (7th Cir. 1996),

> [C]ourts should look for signs of failure to participate in good faith or failure by one of the parties to make reasonable efforts to help the other party determine what specific accommodations are necessary. A party that obstructs or delays the interactive process is not acting in good faith. The party that fails to communicate by way of initiation or response may also be acting in bad faith.

Id. at 1135.

Other circuits hold to this view as well. *See, e.g., Taylor v. Principal Financial Group,* 93 F.3d 155 (5th Cir. 1996); *White v. York International Corp.,* 45 F.3d 357, 363 (10th Cir. 1995); *Jacques v. Clean-Up Group, Inc.,* 1996 U.S.

App. LEXIS 24661 at *19 (1st Cir. 1996). However, the Sixth Circuit's enunciation of a blanket rule that an employer has no obligation whatsoever to accommodate a "regarded as disabled" employee by offering him a chance to perform his job on-site is antithetical to the concept of an interactive dialogue and altogether relieves the employer of its duty to collaborate with the employee to find a mutually acceptable accommodation. The hardship of this ruling is especially highlighted where, as here, Respondents steadfastly and repeatedly rebuffed Petitioner's numerous efforts, while he was still employed by Respondents, to have them consider the input of various medical psychological and vocational experts that the Petitioner should have been offered an opportunity to perform his job, under specific arrangements for neutral observation, to determine whether he was qualified to perform the essential elements of a bench chemist.

Whether or not a particularized on-the-job testing of an employee's qualifications is a recognized accommodation under the ADA is an issue which transcends the predicament of one Ph.D. bench chemist. The answer to such question would have profound and far-reaching implications in the post-industrial information management age for a wide and ever-growing array of employees who work in unique, intellectual settings that cannot be replicated elsewhere. And, even if they could, serious proprietary issues of trade secrets and confidentiality abound which would severely curtail the ability of such an employee to demonstrate his capabilities in offices or laboratories of a rival company. UNUM's rehabilitation specialist Donna Taylor experienced these very

problems when attempting to find an alternate venue for testing Dr. Buck. (App. 67).

Finally, the Sixth Circuit opinion, if allowed to stand, would vindicate the arbitrary refusal of employers like the Respondents to consider the hire or reinstatement of an employee they regard as disabled on the self-serving basis that they do not think the individual can do the job. Employers would in essence be rewarded for their own intransigence.[5]

The U.S. Supreme Court in *Arline* has already decided, in the context of the Rehabilitation Act of 1973, that there exists a duty to accommodate individuals regarded as disabled, after an individualized medical inquiry into Petitioner's ability to perform his job. The Supreme Court has not addressed this issue in the context of the Americans With Disabilities Act. Given the split of opinion in the circuits on this issue, this case presents the ideal vehicle for the Supreme Court to determine whether a duty to accommodate "regarded as" disabled individuals under the Rehabilitation Act of 1973, as articulated in *Arline*, should be extended to the Americans With Disabilities Act and whether that duty encompasses an obligation to cooperate with "regarded as disabled" individuals in arranging an on-the-job individualized test for

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[5] The Sixth Circuit minimizes Dr. Zimmer's favorable report on Petitioner's lab abilities on the basis that the tests he performed in Dr. Zimmer's laboratory were different than those performed in Respondents' laboratory. (App. 11). However, this begs the question as to the legality of Respondents' conduct in frustrating Petitioner's attempt to do just that, submit himself for testing in Respondents' laboratory.

them to demonstrate their ability to perform the essential elements of the job.

For all of these reasons, the Supreme Court should grant *certiorari* to resolve this important issue.

CONCLUSION

For all the reasons set forth above, Petitioner respectfully asks that the within Petition for a Writ of Certiorari be issued to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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NOT RECOMMENDED FOR PUBLICATION

No. 97-3093

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KEITH BUCK,

Plaintiff-Appellant,

v.

FRIES & FRIES, INC.; HERCULES FLAVOR, d/b/a Tastemaker,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of Ohio

(Filed Apr. 3, 1998)

BEFORE: RYAN and SILER, Circuit Judges; and HOOD, District Judge.*

RYAN, Circuit Judge. After Keith Buck, a chemist, suffered a head injury, his employer placed him on disability leave and then terminated his employment. Buck brought suit against Fries & Fries, Inc. and its partner, Hercules Flavor, Inc., which entities do business under the name "Tastemaker." Buck claimed that Tastemaker discriminated against him because of his disability, in violation of the Americans with Disabilities Act, 42 U.S.C. § 12101, and Ohio law, and retaliated against him as well. The district court granted summary judgment in favor of Tastemaker, and Buck now appeals.

* The Honorable Joseph M. Hood, United States District Judge for the Eastern District of Kentucky, sitting by designation.

We are asked to decide whether the district court erred in concluding that Buck was not a qualified individual capable of performing his job with or without reasonable accommodation, and that he had failed to establish a *prima facie* retaliation claim. Our answer to both questions is that the district court did not err, and therefore we shall affirm.

I.

A.

Tastemaker, located in Cincinnati, Ohio, develops and manufactures natural and synthetic flavors for the food and beverage industry. Buck became an employee in 1979, beginning as a Ph.D. research bench chemist and eventually becoming senior research bench chemist. It is uncontroverted that Buck's position in Tastemaker's research chemistry lab was hazardous, involving volatile materials and exposure to extreme heat and cold.

In the fall of 1991, Buck was very highly regarded at work. At that time, however, he had an accident in which he fell on a sidewalk and hit his head, suffering a subdural hematoma. When Buck returned to work between one and two months later, he displayed serious cognitive and physical deficits as a result of the fall. The pertinent issue here is whether, either by the time he was placed on short-term disability some 18 months after his accident or by the time of his termination two and a half years after that, he had improved enough to perform his job.

Tastemaker gave Buck an extended period to get back up to speed on matters of organic chemistry, but did not

permit him to perform lab work, due to safety concerns. While Buck himself was initially content with this arrangement, he eventually began inquiring about returning to the lab. In June 1992, with that end in mind, Buck's supervisor devised a five-stage schedule "for returning [Buck] to the laboratory." Although Buck "successfully accomplished the intellectual steps outlined" in the first four stages, his supervisor wrote Buck a memo in August 1992 expressing his "serious[ ] concern[ ] about [Buck's] abilities to physically handle experimentation in the laboratory in a safe fashion," the fifth stage of the comeback program, based on his observations of Buck's "physical unsteadiness." Thus, Buck was not permitted to perform hands-on experimentation.

In the fall and winter of 1992-93, Tastemaker began exploring the possibility of putting Buck on short-term disability. The director of human resources arranged in March 1993 for Buck to be evaluated by an occupational-medicine doctor, to whose selection Buck agreed. The doctor observed Buck at work; administered a number of psychometric and physical aptitude screening tests; and referred Buck to a neuropsychologist for an evaluation. In a May 1993 report, she wrote:

> There was evidence of significant memory impairment, difficulty in judgement [sic], impaired general thought and organizational processes and impairment in gait and station. . . . [Buck] is unable to retain and process new information and has severe memory deficits. . . . These impairments are permanent. It is unlikely that there will be any significant improvement in the future, particularly given the time elapsed since the injury.

She concluded that Buck was incapable of safely performing the duties of a bench chemist, and that he "would represent a serious safety risk to himself, his co-workers and the surrounding environment."

Based on these findings, Tastemaker placed Buck on STD on May 27, 1993. While on STD, Buck consulted with various physicians and therapists. One neuropsychologist noted cognitive deficits, but opined that "the ecological validity of psychometric tests, especially in highly functional and educated individuals, may be less than optimal." On that basis, he suggested that Buck "may be able to do things on sight which could not be predicated on the basis of [the neuropsychologist's data]," and he therefore characterized a trial period in the lab as a "worthwhile" experiment.

In November 1993, Buck's STD was converted into long-term disability. Shortly before that conversion, Buck filed a charge of disability discrimination with the EEOC. In order to receive LTD benefits, Buck had to file a statement that he was disabled. On the form, he stated that he was unable to work due to a "brain injury which impaired verbal-linguistic & cognitive abil[ities]," and that he was "not permitted to work in lab."

The disability insurer requested an independent medical examination. A neuropsychologist gave a negative prognosis, finding "a certain unreliability of the cognitive system," and noting "considerable concern" at the possibility of Buck's "attempt[ing] to function as a bench chemist in potentially hazardous situations." He felt that Buck's deficits were permanent. The disability insurer also had Buck meet with a "professional counselor" who

stated that, because of "the advanced cognitive functioning required by his position," she could not determine whether Buck had fully recovered. She therefore recommended a "closely supervised trial work period in the laboratory," doing hands-on lab work. Buck was then approved for LTD benefits.

About a year later, in September 1994, in compliance with a requirement of the disability insurer, Buck applied for Social Security benefits. In the application, Buck stated that he "became unable to work because of [his] disabling condition on May 27, 1993," and affirmed that he was "still disabled." Buck was subsequently awarded Social Security benefits.

In the summer of 1995, Buck began working with a University of Cincinnati chemistry professor named Hans Zimmer. Buck performed bench chemistry for Zimmer, sometimes under Zimmer's supervision and sometimes in the presence of Zimmer's students. Zimmer then generated a report on Buck's performance, stating that Buck "proved . . . he is a competent chemist," and that "he works safely, obeying all safety regulations." Zimmer described Buck's work as "solid," and said he had "no doubts whatsoever that given the opportunity he will perform on a Ph.D. level in the lab." This report was sent to Tastemaker in August 1995.

Buck's LTD benefits were terminated after two years, on November 23, 1995, at which time Buck became ineligible because he possessed transferrable skills for jobs he refused to perform. Based on its conclusion that Buck was unable to return to work as a bench chemist, Tastemaker terminated him.

B.

Buck's second amended complaint alleged that his placement on STD and his later termination constituted disability discrimination in violation of the ADA, and that Tastemaker had also retaliated against him for his protected activity. The complaint also included state-law disability claims.

In December 1996, the district court granted summary judgment in favor of Tastemaker. The court recognized that the key inquiry, given Tastemaker's acknowledgment that it terminated him because of his disability, was whether Buck was "otherwise qualified." The court concluded that Buck was not "otherwise qualified," relying in large part on Buck's representations in his disability applications that he was disabled, and concluding that those representations precluded recovery. The court also noted, however, "a mountain of evidence" suggesting that Buck was not qualified to perform his former job responsibilities. In contrast to what it termed this "overwhelming evidence," the court concluded that "the Plaintiff offers little evidence to the contrary." Although noting Zimmer's report, the court dismissed it as a "mere scintilla"; "[T]he report . . . must be examined in the context of all the contrary evidence produced in this case . . . which suggests that the Plaintiff was not qualified." *Buck v. Fries & Fries, Inc.*, 953 F. Supp. 896, 906 n. 18 (S.D. Ohio 1996).

The court next rejected Buck's retaliation claim. The adverse employment action, according to Buck, was Tastemaker's " 'refusing to consult with physicians offered by [the] Plaintiff who were of the opinion that

[he] might be able to perform the essential elements of his job with a reasonable accommodation.' " The court noted that Buck "failed to identify one shred of evidence that he or his physicians proposed specific actions which would enable the Plaintiff to return to working in a chemistry lab." It concluded that, "[t]herefore, the Defendant's alleged failure to accommodate the Plaintiff cannot satisfy the 'adverse employment decision' requirement of the Plaintiff's retaliation claim." The termination could not be shown to be retaliatory, the court concluded, again because Buck "failed to produce any evidence that his termination was related to . . . the protected activities in which he engaged."

II.

This court reviews *de novo* the district court's grant of summary judgment to the employer in an ADA action. *See Smith v. Ameritech*, 129 F.3d 857, 863 (6th Cir. 1997).

> A court may grant summary judgment only if there are no issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). "The judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 . . . (1986). However, " '[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.' " *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1477 (6th

Cir. 1989) (quoting *Anderson*, 477 U.S. at 252 . . .).

Adkins v. UMW, 941 F.2d 392, 399 (6th Cir. 1991).

III.

A.

We address first the district court's conclusion that Buck's representation in this disability application precluded recovery under the ADA. This issue is easily resolved. Recently, in *Griffith v. Wal-Mart*, 135 F.3d 376 (6th Cir. 1998), we explained that statements made in the context of a disability application "should not be the subject of judicial estoppel or a theory of 'super admissions,' but rather should be analyzed under traditional summary judgment principles." *Id.* at 383. We characterized " 'such representations [as] relevant evidence of the extent of a plaintiff's disability, upon which an employer may rely in attempting to establish that an ADA plaintiff is not a "qualified individual with a disability." ' " *Id.* (citation omitted). But it is beyond dispute, in this circuit at least, that such " 'representations are not conclusive as to the ADA issue,' " and a plaintiff is entitled to " 'come forward with additional evidence that shows she could perform the essential duties of a desired position with or without reasonable accommodation notwithstanding the fact that she might have been deemed disabled under some other statutory or contractual framework.' " *Id.* (citation omitted).

B.

The ADA prohibits discrimination against "a qualified individual with a disability because of the disability of such individual" with regard to hiring, compensation, discharge, and other terms, conditions, and privileges of employment. 42 U.S.C. § 12112(a). Thus, to make out a *prima facie* case of ADA discrimination, a plaintiff must show that he is qualified, with or without reasonable accommodation, to perform the essential functions of the job in which he suffered an adverse employment action. *See Kocsis v. Multi-care Management, Inc.*, 97 F.3d 876, 882 (6th Cir. 1996). The plaintiff must have been qualified at the time of the particular adverse employment action in question. *See Griffith*, 135 F.3d at 380.

Buck argues that because he was never allowed to demonstrate that he could perform his job, it was never determined whether he needed accommodation; therefore, he concludes, Tastemaker failed to accommodate him. His accommodation theory is, apparently, that "the most effective accommodation was to allow him an opportunity to demonstrate his abilities to perform the essential elements of his job." Buck's theory is that his brain injury has not actually impaired his abilities, but the defendants have incorrectly perceived it as doing so "based on their preconceived attitude." He argues that the various paper-and-pencil tests were not particularized to his job; that the defendants were required to perform an "individualized assessment of Dr. Buck under the unique conditions of his job"; and that the defendants could not rely on "gross screening devices."

Buck's theory, that Tastemaker was required by the ADA's accommodation provisions to give him a particular type of testing to determine his qualifications, is simply incorrect. Providing particularized testing of an employee's qualifications is simply not an accommodation under the ADA, because it does not serve to enable an employee to perform his job – it only helps to determine whether the employee is capable of performing his assigned tasks. Tastemaker was entitled to rely on its own chosen method of coming to the conclusion that Buck was not qualified; it simply ran the risk that he would sue, and the collateral risk that he could prove their conclusion to be wrong. Buck *has* sued, and the question now becomes whether he has evidence that he was in fact qualified at the time of the adverse employment actions in question, contrary to Tastemaker's conclusion that he was not.

Thus, having resolved the disability-representations and the accommodation issues, we are left with the usual summary-judgment employment-discrimination case. In *Monette v. Electronic Data Systems Corp.*, 90 F.3d 1173 (6th Cir. 1996), this court set forth the analysis applicable to the type of disability-discrimination case presented here:

> The *McDonnell Douglas* burden shifting approach is unnecessary because the issue of the employer's intent, the issue for which *McDonnell Douglas* was designed, has been admitted by the defendant in such cases, and the plaintiff has direct evidence of discrimination on the basis of his or her disability. Assuming that the plaintiff in such a case is in fact statutorily "disabled," the determinative disputed issue in the case will not be the employer's "intent," but instead in

> most cases will be whether the employee is "otherwise qualified," with or without reasonable accommodation, to perform the job, a factual dispute capable of resolution through traditional methods of proof.

Id. at 1182. This case, moreover, falls into a particular subcategory of such claims, as it is a case "in which the plaintiff is not seeking a reasonable accommodation but is instead making the straightforward claim that he or she can in fact function capably in the sought after position as it exists." *Id.* Therefore, in sum, Buck bears the burden of establishing that he is "otherwise qualified" for the position despite his disability, without accommodation.

Buck's evidence does not get the job done. First, Buck has *no* evidence that he was qualified at the time he was placed on disability, and the district court was, therefore, indisputably correct to grant summary judgment to Tastemaker on this aspect of Buck's claim.

Buck's only evidence that he was qualified at the time he was terminated is Zimmer's report. The district court was correct to disregard this report in the face of what it termed a "mountain" of contrary evidence. As Tastemaker points out, Zimmer's report is of negligible significance: the tasks Buck performed for Zimmer are far different than those he performed at Tastemaker. Tastemaker appears to have bent over backward in order to ascertain Buck's functional ability, and it premised its termination of him on detailed information. Under these circumstances, the district court's grant of summary judgment easily withstands scrutiny.

C.

The ADA provides that "[n]o person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by [the ADA] or because such individual made a charge . . . under [the ADA]." 42 U.S.C. § 12203(a). "Retaliation claims are treated the same whether brought under the ADA or Title VII." *Penny v. United Parcel Service*, 128 F.3d 408, 417 (6th Cir. 1997).

> To establish a prima facie case of retaliation, a plaintiff must show: (1) that he engaged in protected activity; (2) that he suffered adverse employment action; and (3) that a causal connection existed between the protected activity and the adverse action. If the plaintiff establishes a prima facie case of retaliation, the burden shifts to the defendant to establish a legitimate, nondiscriminatory reason for the adverse employment action. The plaintiff, of course, bears the ultimate burden of proving that the proffered reason for the action was merely a pretext for discrimination.

Id.

In his final argument, Buck asserts that Tastemaker's "retaliatory mindset is beyond dispute," and that the district court erred, therefore, when it granted summary judgment on his retaliation claim. Buck again takes the position that his request for testing amounted to a request for accommodation, and thus was a statutorily protected activity.

We note first that the district court applied the wrong, "significant factor" standard; a plaintiff who

proves a causal link between protected activity and an adverse employment action has established a *prima facie* showing of retaliation. But, as Tastemaker points out, the error is of no consequence. Although premising too stringent a standard, the district court went on to hold that there was a complete absence of any evidence of a nexus between Buck's sole protected activity – his filing of an EEOC charge – and his eventual termination. The other alleged adverse employment action Buck points to, the refusal to give him a particular type of testing, is not actually an adverse employment action; Buck is simply mistaken, as we have already discussed and as the district court observed, in thinking that testing is a form of accommodation.

IV.

The district court's judgment is **AFFIRMED.**

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Keith Buck, Plaintiff	)	Civil Action C-1-94-555
v.	)	
Fries & Fries, Inc., et al.	)	
Defendants.	)	

MEMORANDUM AND ORDER

(Filed Dec. 29, 1996)

This matter comes before the Court to consider the Defendant's motion for summary judgment filed pursuant to Rule 56 of the Federal Rules of Civil Procedure.

This case arises out of the Plaintiff's claim that the Defendant[1] discriminated against him in violation of the Americans With Disabilities Act ("ADA"), 42 U.S.C. § 12101. The Plaintiff alleges that he was disabled as a result of an accident that occurred in 1991, in which he suffered an injury to the frontal lobes of his brain. The

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[1] The Plaintiff brings this suit against Fries & Fries, Inc., and Hercules Flavor, Inc. These entities are engaged in a partnership, and are jointly doing business under the name "Tastemaker." At the time of the Plaintiff's alleged wrongful placement on disability leave and termination, he was an employee of Tastemaker. The Plaintiff asserts that Defendants Fries & Fries, Inc., and Hercules Flavor, Inc., are jointly and severally liable for the actions of Tastemaker. For the sake of simplicity, the Court will refer to the Defendants collectively as "Tastemaker" or "the Defendant."

Plaintiff contends that he was wrongfully placed on disability leave in 1993 and wrongfully terminated in 1995, despite his representations that he could continue to perform the essential elements of his job with or without reasonable accommodation. In addition, the Plaintiff alleges that the Defendants retaliated against him for engaging in statutorily protected activity, in violation of the retaliation provisions of the ADA. Finally, the Plaintiff alleges that the Defendants violated parallel provisions of Ohio anti-discrimination laws, and violated the public policy of the state of Ohio.

Background

The Plaintiff is a Ph.D. chemist and was hired by the Defendant in 1979 to act as a research bench chemist. In that capacity, the Plaintiff's primary duty was to create new chemical synthesis designs and physically implement laboratory experiments to test the new designs. The Plaintiff's job responsibilities required him to conduct lab work which involved volatile materials in a hazardous laboratory environment. Prior to his accident in 1991, the Plaintiff was a highly regarded and productive bench chemist at Tastemaker.

On September 12, 1991, the Plaintiff fell and hit his head on the sidewalk. As a result, he suffered a subdural hematoma, which required emergency surgery. After remaining in the hospital for several weeks, he was released by his neurologist, Dr. James Anthony. Shortly thereafter, he returned to work. At the time of his returning to work, the Plaintiff continued to be afflicted with physical and cognitive problems which resulted from his

fall. His immediate supervisor instructed him not to report to the research lab, but instead to do numerous activities outside of the lab. Throughout the next several months, the Plaintiff's physical and cognitive abilities did show improvement, but eventually appeared to plateau.

Upon returning to work, the Plaintiff was initially disinterested and disengaged in his prior work responsibilities. However, as the Plaintiff's condition improved, he repeatedly expressed a desire to return to working in the lab. In response to the Plaintiff's requests, the Defendant began to evaluate the possibility of returning the Plaintiff to his prior responsibilities in the lab.

In their memoranda, the parties have outlined in painstaking detail the occurrences which took place in the two years between the Plaintiff's accident and the Defendant's placing him on disability leave.[2] For the sake

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[2] The Court notes that both parties far exceeded the twenty page limit for legal memoranda set forth in Local Rule 7.2(a)(3) for the Southern District of Ohio. In addition, neither party filed for leave to submit memoranda in excess of twenty pages. Because of the parties' failure to exercise discretion in determining which facts and arguments were most relevant to the Defendant's motion, the Court was forced to drudge through pleadings which approached one hundred pages in length. While similarly long memoranda may be appropriate for a case with complex legal issues, the Court questions whether such detail was necessary for this "garden variety" discrimination claim. Admittedly, the Court doubts that the Defendant's motion for summary judgment could have been briefed by the parties within the twenty page limit. However, this fact highlights the litigiousness with which this case was approached by counsel for both parties. While the Court cannot doubt that counsel were thorough, it questions whether the

of judicial economy, the Court will attempt to summarize what transpired in a concise form.

Throughout the two year period between the Plaintiff's accident and his being placed on disability leave, a number of Tastemaker employees had an opportunity to interact with him. The Defendant has elicited affidavits and deposition testimony from a number of co-workers which strongly suggests that the Defendant's physical and cognitive impairments made him unable to work as a bench chemist. Nonetheless, the Plaintiff's immediate supervisor, Dr. Anthony Dennis, established a five-stage plan which was designed to facilitate the Plaintiff's return to the lab. Indeed, the Plaintiff successfully completed the first several steps, which dealt with demonstrating intellectual abilities. However, Dr. Dennis was not certain that the Plaintiff was ready to conduct the final step of the plan, which required the Plaintiff to actually perform lab experimentation. Based on his own observations and those of the Plaintiff's co-workers, Dr. Dennis was concerned that the Plaintiff was unable to perform lab work in a safe and conscientious manner. Specifically, the Plaintiff's physical stability and his memory were questioned by Dr. Dennis and the Plaintiff's co-workers.

In an effort to facilitate the Plaintiff's goal of returning to his prior job responsibilities, the Defendant provided the Plaintiff with physical and rehabilitation

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parties paying their legal fees appreciate such attention to minutia.

therapy. The Defendant even approved and paid for additional therapy beyond what its medical insurance covered. In addition, the Defendant made lab technicians available to the Plaintiff so that they could do experimentation under the Plaintiff's supervision. Nonetheless, the Plaintiff continued to insist that he be allowed to return to his lab work.[3]

In an effort to determine whether or not the Plaintiff could safely return to his lab work, the Defendant commissioned Dr. Ann Middaugh, an occupational medicine physician, to evaluate the Plaintiff. Dr. Middaugh found that the Plaintiff suffered permanent neurological impairment, including gait disturbance, memory problems, and cognitive dysfunction. In addition, Dr. Middaugh referred the Plaintiff to Dr. Edward Barrett for a comprehensive neurological evaluation. After two months of evaluation, including on-site observation and a battery of neurological testing conducted by Dr. Barrett,[4] Dr. Middaugh concluded that the Plaintiff was unfit to conduct bench chemistry in a reliable and safe manner. *See* Defendant's Exhibit FF.

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[3] The record indicates that, on one occasion, the Plaintiff conducted lab work despite the fact that he did not have the Defendant's permission to do so. On April 29, 1993, the Plaintiff attempted to conduct a lab experiment. In executing the experiment, the Plaintiff failed to follow a safety procedure. While the Plaintiff questions whether his actions created a safety hazard, he does not deny conducting the experiment or failing to follow the safety procedure in question.

[4] In his report, Dr. Barrett stated that he "seriously question[ed]" whether the Plaintiff could return to bench chemistry: *See* Plaintiff's Exhibit V.

Upon considering Dr. Middaugh's evaluation, the Defendant placed the Plaintiff on a short-term disability leave of absence on May 27, 1993. After several months of the Plaintiff's receiving short-term disability benefits, the Defendant sought to obtain long-term disability status for the Plaintiff from its long-term disability insurance carrier, UNUM Life Insurance Company ("UNUM"). In order for the Plaintiff to be eligible for long-term disability benefits, he had to establish that he was disabled and was unable to return to work. The Plaintiff and his primary physician, Dr. Anthony, submitted statements regarding his disability.[5] In addition, UNUM obtained an independent medical evaluation from Dr. Robert Tureen, a neurologist who had previously examined and evaluated the Plaintiff. Dr. Tureen stated in his report that, based on his evaluation, he "could not confidently recommend [that the plaintiff] return to his former position as a bench chemist." *See* Defendant's Exhibit II. Based on the information presented to UNUM, the Plaintiff secured and subsequently received long-term disability benefits from UNUM.

On or about September 6, 1994, the Plaintiff applied for Social Security Disability Benefits, at the request of UNUM. UNUM requested that he apply for such benefits because, if the Plaintiff was eligible, UNUM would be

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[5] The Plaintiff makes much of the fact that he and his physician did not admit on the UNUM application that the Plaintiff was disabled, but merely stated that the Defendant believed that he was unable to work in his former capacity. However, as will be discussed *infra*, this distinction does not demonstrate that summary judgment on behalf of the Defendant is inappropriate.

entitled to a set-off for the amount of Social Security benefits received by the Plaintiff. In support of the Plaintiff's application, the Plaintiff certified that he had become "unable to work because of [his] disabling condition," and that he was "still disabled." *See* Defendant's Exhibit JJ. In the signed application, the Plaintiff also certified that he knew that "anyone who makes or causes to be made a false statement or representation of material fact in [the] application . . . commits a crime punishable under Federal law by fine, imprisonment or both," and that "all information [he had] given in connection with this claim is true." *See id.* Further, the Plaintiff secured a statement from Dr. Anthony in support of his Social Security disability application. *See* Defendant's Exhibit LL Attached to Dr. Anthony's statement was a copy of Dr. Middaugh's report, in which she concluded that the Plaintiff was unable to return to work as a bench chemist. *See Id.*

In addition to this material, the Social Security Administration ("SSA") obtained the records and reports of several other physicians who evaluated the Plaintiff, and even solicited the opinion of Dr. Kuldip Singh, who had not previously examined or evaluated the Plaintiff's condition. *See* Exhibit OO. Again, Dr. Singh's evaluation supported the Plaintiff's sworn statement that he was unable to work as a bench chemist. Upon reviewing the information submitted on behalf of the Plaintiff, the SSA concluded that the Plaintiff was disabled due to "organic mental disorders," and awarded disability benefits to the Plaintiff. *See* Defendant's Exhibit PP. The Plaintiff's disability payments became effective in June 1995, and benefits were paid retroactively to November 23, 1993. The

Plaintiff continues to receive Social Security benefits to date.

In October, 1995, UNUM notified Tastemaker that the Plaintiff would not be eligible for long-term disability benefits beginning November 23, 1995. UNUM stated that, although it did not appear as though the Plaintiff was able to perform his prior job at Tastemaker, "he did possess transferrable skills that he could utilize to perform other occupations. . . . " *See* Defendant's Exhibit KK.[6] Based on its conclusion that the Plaintiff was unable to return to his position as a bench chemist, the Defendant terminated the Plaintiff's employment effective November 23, 1995.

Standard of Review

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The evidence presented on a motion for summary judgment is construed in the light most

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[6] UNUM also cited the Plaintiff and his wife's alleged refusal to participate in a job simulation in order to determine whether he was capable of returning to bench chemistry, unless the simulation was performed at Tastemaker. The Plaintiff disputes this allegation, and states that he had agreed to participating in a simulation, whether at Tastemaker or elsewhere. While this issue of fact remains in dispute, it is not material in determining whether the Defendant's motion for summary judgment is well taken. *See* discussion *infra* at FN18.

favorable to the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654 (1962). "The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (emphasis in original).

Summary judgment is clearly proper "against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Significantly, the Supreme Court also instructed that the "the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion" against a party who fails to make that showing with significantly probative evidence. *Id.*; *Anderson*, 477 U.S. at 250. Rule 56(e) requires the non-moving party to go beyond the pleadings and designate "specific facts showing that there is a genuine issue for trial." *Id.* In addition, a "mere . . . scintilla of evidence in support of the plaintiff's position will be insufficient" for the Plaintiff to survive a motion for summary judgment, and "there must be evidence on which [a] jury could reasonably find for the plaintiff." *Anderson v. Liberty Lobby*, 477 U.S. 242, 252 (1986).

Plaintiff's Discrimination Claim

To recover for a claim of discrimination under the ADA, the Plaintiff must show that: 1) he is an individual

with a disability; 2) he is "otherwise qualified" to perform the job requirements, with or without reasonable accommodation; and 3) he was discharged solely by reason of his handicap. *Monette v. Electronic Data Sys. Corp.*, 90 F.3d 1173, 1178 (6th Cir. 1996). In the instant case, the Defendant does not deny that it relied on the Plaintiff's disability in deciding to place him on disability leave and to discharge him. The Sixth Circuit Court of Appeals has set forth the applicable standard for this type of discrimination case in *Monette v. Electronic Data Sys. Corp.*, 90 F.3d 1173 (6th Cir. 1996). In *Monette*, the Court recognized that the burden-shifting analysis set forth by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-803 (1973), is not appropriate when the Defendant terminates an employee because the employee's disability prevents him from being qualified for his job. *See Monette*, 90 F.3d at 1182.[7] Instead, the typical inquiry in cases

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[7] The *Monette* Court recognized that, pursuant to *McDonnell Douglas*,

> a plaintiff may establish a prima facie case of discrimination by establishing that: 1) she is a member of a protected class; 2) she is qualified for the position; 3) she suffered an adverse employment decision; and 4) she was replaced by a member outside the protected class. . . . If the plaintiff is able to establish a prima facie case of discrimination, the burden of production then shifts to the employer to assert a legitimate, non-discriminatory justification for its action. . . . If the employer fails in this burden of production, the plaintiff need not introduce any other evidence of discrimination, and a mandatory inference of discrimination must be drawn by the fact finder. . . . However, once the employer has come forward with evidence of a legitimate reason for its

where the employer relies on the employee's disability is whether the employee remains "otherwise qualified" to perform the job. *See id.* In this case, the Plaintiff's alleged qualification for his former position is the central issue, and the Plaintiff bears the burden of demonstrating that he was qualified at the time of the adverse employment decision. *See id.* at 1184.

The Defendant offers several different theories in support of its motion for summary judgment regarding the Plaintiff's ADA discrimination claim. The first theory is that the Plaintiff is precluded from claiming that he was qualified for his former job position because of his statements to the long-term disability insurer (UNUM) and the SSA, in which he claimed that he was disabled and unable to work. Because the Court finds this argument to be determinative, it need not consider the Defendant's other arguments that summary judgment is appropriate.

A growing number of federal courts are being faced with the question of whether a plaintiff's representations to an insurance carrier or the SSA that he is disabled and unable to work later preclude him from successfully

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> action, the inference shifts from a mandatory one the fact finder must draw, to a permissive one the fact finder may draw, and the burden shifts back to the employee to establish that the employer's proffered explanation is a mere pretext for unlawful discrimination.

See Monette, F.3d at 1179 (citations omitted). Again, this analysis is inappropriate when the employer admits to having relied upon the plaintiff's disability in making the adverse employment decision. *See id.*

bringing an ADA claim. Indeed, the vast majority of courts which have considered this issue have held that such representations preclude a plaintiff from later demonstrating that he was qualified to perform his prior job duties. *See, McNemar v. Disney Store, Inc.*, 91 F.3d 610, 618-19 (3d Cir. 1996) (quoting the district court's finding that "most federal courts agree that an employee who represents on a benefits application that he is disabled in judicially estopped from arguing that he is qualified to perform the duties of the position involved."); *Griffith v. Wal-Mart Stores, Inc.*, 930 F. Supp. 1167, 70 (E.D. Ky. 1996) ("The majority of federal courts faced with the issue have ruled that an ADA plaintiff who has represented that he or she is disabled in order to obtain benefits under Long-Term Disability . . . insurance, social security, or workers' compensation is not a 'qualified individual' under the ADA as a matter of law."). While the Sixth Circuit Court of Appeals has yet to address the issue, this Court finds the reasoning behind the majority trend to be compelling and the doctrine to be applicable in this case.

Courts which have precluded plaintiffs from showing they were qualified for prior job responsibilities because of representations of disability to the SSA or an insurance carrier have framed the doctrine in a number of ways. *See, e.g., McNemar*, 91 F.3d at 617-18 (applying the doctrine of judicial estoppel); *August v. Offices Unlimited, Inc.*, 981 F.2d 576, 583 (1st Cir. 1992) (treating the plaintiff's statements regarding disability to insurance carriers as binding admissions); *Griffith*, 930 F. Supp. at 1169-70 (E.D. Ky. 1996) (stating simply that the Plaintiff's representations in his application for social security disability benefits precluded him from satisfying the elements of his

prima facie case); *Morton v. GTE North Inc.*, 922 F. Supp. 1169, 1182 (N.D. Tex. 1996) (discussing the issue in terms of whether the plaintiff had standing to bring an ADA claim). Regardless of how courts have categorized the doctrine, the principle underlying its application is the same: the Plaintiff "cannot speak out of both sides of [his] mouth with equal vigor and credibility" before the court. *Reigel v. Kaiser Found, Health Plan*, 859 F. Supp. 963, 969 (E.D.N.C. 1994); *accord McNemar*, 91 F.3d at 618. Specifically, a plaintiff cannot claim under oath that he is disabled in order to procure permanent disability benefits, and then later claim that he was not disabled for the purposes of proving he was "otherwise qualified" under the ADA.

In applying this doctrine, courts have varied regarding the scope of its preclusive effect. Some courts have held that the plaintiff is strictly estopped from attempting to prove that he was qualified. *See, e.g., Cheatwood v. Roanoke Indus.*, 891 F. Supp. 1528, 1538 (N.D. Ala. 1995) (finding that the plaintiff was bound by his prior testimony and therefore unable to assert that he could perform the essential functions of his job); *Garcia-Paz v. Swift Textiles, Inc.*, 873 F. Supp. 547, 555 (D. Kan. 1995) (finding that the plaintiff was estopped from claiming that he was qualified). Other courts have stated that a plaintiff's representations to insurance carriers or the SSA are merely one factor, albeit an important one, to be considered in determining whether the plaintiff was qualified. *See, e.g., Morton v. GTE North Inc.*, 922 F. Supp. at 1182 (holding that the plaintiff's representations were only one factor to be considered in determining whether she was qualified); *Dockery v. North Shore Medical Ctr.*, 909 F. Supp. 1550, 1559

(S.D. Fla. 1995) (finding that the plaintiff's representations were not dispositive, though finding them to be relevant factors in determining whether summary judgment should be granted).[8] Finally, a number of courts have applied the doctrine without stating whether or not the plaintiff's representations strictly precluded the plaintiff from establishing qualification, or whether they were just a factor to be considered. *See, e.g., Reigel*, 859 F. Supp. at 969 (merely stating that the plaintiff failed to meet her burden of proving that she was qualified).

This Court need not determine the appropriate scope of the preclusive effect of the doctrine in this case. Regardless of whether the Plaintiff's representations to UNUM and the SSA are dispositive or merely substantial factors in determining whether the Plaintiff was qualified, the Court concludes that he has failed to establish his qualification as a matter of law.

In this case, the Plaintiff certified to the SSA that he had become "unable to work because of [his] disabling condition," and that he was "still disabled." *See* Defendant's Exhibit JJ. In the signed application, the Plaintiff also certified his knowledge that "anyone who makes or causes to be made a false statement or representation of

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[8] To be sure, that the vast majority of courts which stated that the plaintiff's representations were only one factor to be considered ultimately found that the plaintiffs could not meet their burden of proving they were otherwise qualified. *See, e.g., Morton*, 922 F. Supp. at 1183 (finding that the plaintiff was not qualified as a matter of law); *Dockery*, 909 F. Supp. at 1559 ("[T]he fact that a plaintiff has made sworn statements that she is disabled will, most surely, hamper her ability to survive any motion for summary judgment.").

material fact in [the] application . . . commits a crime punishable under Federal law by fine, imprisonment or both," and that "all information [he had] given in connection with this claim is true." *See id.* In addition, the Plaintiff secured a statement from Dr. Anthony in support of his Social Security disability application. *See* Defendant's Exhibit LL. Attached to Dr. Anthony's statement was a copy of Dr. Middaugh's report, in which she concluded that the Plaintiff was unable to return to work as a bench chemist. *See id.*[9] By certifying under penalty of perjury that he was disabled and unable to work, the Plaintiff has seriously "hampered h[is] ability to survive [a] motion for summary judgment." *Dockery*, 909 F. Supp. at 1559.

Further, the record suggests, and the Plaintiff does not refute, that he continues to receive SSA benefits to date. Every time the Plaintiff cashes a check from the SSA, he ratified his assertion that he is disabled and unable to work, and reaps the benefits of such representations. *See Simo v. Home Health & Hospice Care*, 906 F. Supp. 714, 721 (D. N.H. 1995) (finding that, where the plaintiff had received over five years worth of government benefits, and continued to "reap[] the benefits of her past representations of total disability," she could not advance

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[9] In his memorandum, the Plaintiff attacks the credibility of Dr. Middaugh's evaluation and report, suggesting that she was not qualified to determine whether the Plaintiff was able to work as a bench chemist. *See* Plaintiff's Memorandum at 12-14. However, the Plaintiff's physician did not appear to be concerned about Dr. Middaugh's qualifications when he attached her report to his statement to the SSA in an effort to secure benefits for his patient. *See* Defendant's Exhibit LL.

a claim for disability discrimination); *Reiff v. Interim Personnel, Inc.*, 906 F. Supp. 1280, 1292 (D. Minn. 1995) ("[T]he fact remains that [the Plaintiff] continued to accept the checks from [an insurance carrier] that explicitly hinged on his previous representations that he was unable to perform the material and substantial functions of his job," and therefore the Plaintiff could not argue he was qualified). In light of the Plaintiff's continued receipt of Social Security benefits, this Court doubts that a reasonable jury could conclude that the Plaintiff was qualified to work in his former capacity.[10]

In addition to the Plaintiff and his physician's representations to the SSA, the Defendants have produced a mountain of evidence which suggests that the Plaintiff was no longer qualified to perform his former job responsibilities. This evidence includes the Plaintiff's application for long-term disability benefits, UNUM and the SSA's subsequent approval and payment of such benefits,

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[10] The Plaintiff's continued receipt of Social Security benefits highlights the implausibility of the Plaintiff's argument that he could be eligible for such benefits and qualified to perform his former job responsibilities at the same time. If the Plaintiff were successful in his discrimination claim and were to be reinstated at Tastemaker, surely he would not be entitled to continue receiving Social Security benefits; otherwise, the Plaintiff would receive a "double-recovery." Further, if he were awarded back pay, the Plaintiff would be required to compensate the SSA for past benefits he received. This very plausible scenario demonstrates the logical inconsistency with the Plaintiff's position: if he should be required to pay back the Social Security benefits upon succeeding in a discrimination claims, how can he claim to be qualified and eligible for SSA benefits at the same time?

the records and reports of several physicians who evaluated the Plaintiff, and statements by the Plaintiff's coworkers that he was no longer able to function effectively. This evidence, along with the Plaintiff's sworn statements and his primary physician's report to the SSA, lead the Court to conclude that no reasonable jury could find that the Plaintiff was qualified for his prior employment position. *Cf. August*, 981 F.2d at 582 (finding that "no reasonable fact finder could conclude that . . . [the Plaintiff] was a qualified [disabled] person within the meaning of" a state statute which paralleled the ADA); *Kennedy v. Applause, Inc.*, 1994 WL 740765, *6 (C.D. Cal.), *aff'd* 90 F.3d 1477 (1996) (stating that, from the totality of the circumstances in the case, no reasonable jury could conclude that the Plaintiff was qualified).

The Plaintiff proffers a number of arguments in support of his position that his representations to UNUM and the SSA should not preclude his ADA claim. First, the Plaintiff argues that his representations to UNUM and the SSA are merely a factor to be considered in determining whether or not he remained qualified to act as a bench chemist, rather than being dispositive on the matter. However, this Court has already concluded that it need not determine with precision the scope of preclusivity that the Plaintiff's statements have on his claim of qualification.[11] Regardless of whether the Plaintiff's

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[11] The Plaintiff cites a number of cases which stand for the proposition that the plaintiff's representations are only one factor to be considered in determining qualification. However, in the majority of those cases, the courts ultimately concluded that the plaintiffs failed to establish their *prima facie* case. *See* cases cited, *supra*, at FN8. Further, most of these cases suggest

representations to the SSA strictly preclude the Plaintiff from establishing his qualification, or whether they are instead a substantial factor, the Court concludes that the Plaintiff has failed to establish his qualification as a matter of law.

Secondly, the Plaintiff cites the Seventh Circuit Court of appeals' decision in *Overton v. Reilly*, 977 F.2d 1190 (7th Cir. 1992), as support for his contention that he was eligible for Social Security benefits while, at the same time, being qualified for his former job position. In *Overton*, the plaintiff was granted Social Security benefits based on the SSA's finding that the claimant met the criteria for a listed disability, without having inquired into his ability to find work within the economy generally. In addition, the Court found that the plaintiff produced evidence that his work was adequate and well received. *See id.* at 1196. On these facts, the Court concluded that a material issue existed as to whether the plaintiff was qualified for his prior position. *See id.* In addition, the *Overton* court stated in dicta that, "even if a finding of disability could have preclusive effect in a

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that the plaintiff's representations were a substantial factor in the courts' determination that the plaintiffs were not qualified. *See, e.g., Dockery*, 909 F. Supp. at 1559 ("[T]he fact that a plaintiff has made sworn statements that she is disabled will, most surely, hamper her ability to survive any motion for summary judgment."); *Pegues v. Emerson Elec. Co.*, 913 F. Supp. 976, 980-81 (N.D. Miss. 1996) ("Although the court does not believe that a finding of disability by the . . . [SSA] necessarily forecloses an ADA claim, . . . the substance of [the plaintiff's] testimony and representations . . . and the subsequent findings by both administrative bodies . . . pose the greatest hurdle for" the plaintiff).

private lawsuit, . . . such a finding is consistent with a claim that the disabled person is 'qualified'. . . . " The Court based this conclusion on the fact that, in determining eligibility for Social Security benefits, the SSA inquires into an applicant's ability to find work in the national economy, rather than his ability to perform a specific job. *See id.* The Court further reasoned that the SSA's generalized inquiry could not be construed as a judgment that the plaintiff was no longer qualified to perform his job. *See id.*

Aside from finding the *Overton* decision to be distinguishable on its facts[12], this Court concludes that the *Overton* rationale is not compelling. While it is true that the SSA makes a generalized inquiry into the applicant's ability to find work in the national economy, *see Overton*, it appears as though this broader inquiry will often encompass the narrower inquiry as to whether a plaintiff

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[12] A number of other courts have distinguished *Overton* on its facts. *See, e.g., McNemar*, 91 F.3d at 619 (distinguishing *Overton* on its facts and questioning the soundness of the decision for reasons other than those raised by this Court); *Griffith*, 930 F. Supp. at 1172-73 (distinguishing *Overton* on its facts); *Reiff*, 906 F. Supp. 1280, 1290-91 (distinguishing *Overton* on its facts). The *Overton* case is distinguishable from the instant case because the plaintiff in Overton automatically qualified for Social Security benefits. *See id.* 1196. Therefore, the SSA did not conduct an individualized inquiry into the plaintiff's employability. *See id.* However, in the instant case, the SSA not only conducted an individualized inquiry into the Plaintiff's employability, it did so entirely within the context of his ability to perform as a bench chemist. *See Reiff*, 906 F. Supp. 1280, 1290-91 (recognizing that *Overton* is inapplicable where the plaintiff produces evidence of his inability to work at his former job in order to secure Social Security benefits).

is qualified to do a specific job. This is particularly true in the present case, where the Plaintiff's former position was that of a Ph.D. chemist. Further, even if this "greater includes the lesser" argument is not true in every case, the *Overton* court failed to address the underlying problem of a plaintiff's achieving a double recovery if he receives SSA benefits yet also succeeds on his ADA claim.[13] Therefore, the Plaintiff's citation of *Overton* and its progeny, which composes a small minority of the persuasive authority, does not render the Defendant's motion for summary judgment meritless.

Third, the Plaintiff asserts that his statements to UNUM and the SSA should not preclude his ADA claim because he qualified his statements regarding his disability on occasions. Specifically, the Plaintiff highlights the fact that both he and his doctor stated in his application to UNUM that the *Defendant* believed that the Plaintiff was disabled and unable to work. In addition, the Plaintiff calls to the Court's attention instances in which, after having sworn under oath that he was disabled, the Plaintiff told the SSA that he felt capable of performing his prior job duties. Again, the Court finds the Plaintiff's contentions to be of no avail.

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[13] This Court cannot envision any forum allowing a plaintiff to be reinstated or compensated for lost wages pursuant to an ADA claim, while at the same time receiving Social Security benefits. This being the case, the notion that a plaintiff can be eligible for Social Security benefits while also being qualified to perform his prior work duties seems analytically unsound. *See* discussion, *supra*, at FN10.

First, in considering the Plaintiff's statements regarding his disability, the Court has deliberately focused more heavily on his SSA application than his application with UNUM. This is true because the UNUM application does not appear to have been made under oath, while the SSA application was. *Cf. McNemar,* 91 F.3d at 615 (emphasizing the importance of the fact that the plaintiff's statements regarding disability were made under oath); *Griffith,* 930 F. Supp. at 1168-69 (same). Indeed, the UNUM application does provide additional evidence of the Plaintiff's disability. However, any equivocation by the Plaintiff or his doctor in the UNUM application cannot preclude summary judgment on behalf of the Defendant.

Second, the Plaintiff's subjective statements to the SSA regarding his ability to perform his prior job functions, which were made after his sworn statement of disability, cannot defeat the Defendant's motion for summary judgment. First, the Plaintiff's subjective belief as to his ability to perform his prior job functions is highly suspect. The nature of his injury, in addition to the zeal with which the Plaintiff sought to return to the lab, demonstrate that his subjective assessment of his ability to perform is highly suspect.[14] In addition, the mere fact

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[14] While the Plaintiff's subjective opinion regarding his qualification is suspect, this fact does not detract from his attempting to speak out of both sides of his mouth. The Plaintiff claimed under oath that he was disabled and elicited a report from his physician to that effect in order to secure SSA benefits. Despite his later claims that he was able to perform his previous job responsibilities, the SSA considered substantial evidence to the contrary and concluded that he was unable to do so. Under

that the Plaintiff later contradicted his sworn SSA application cannot establish that he was qualified for his former position. *See Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1481 (9th Cir. 1996) (affirming the district court's conclusion that no material issue of fact remained despite the plaintiff's contradictory statements regarding qualification in her deposition testimony, and concluding that her contradictory deposition testimony did not present a sufficient disagreement to require submission to a jury).

The Plaintiff also argues that the Defendant's motion for summary judgment is improper because the Defendant and UNUM provided the impetus for the Plaintiff's having applied for long-term disability and Social Security benefits. The Plaintiff appears to argue that he should not be held responsible for his representations to UNUM and the SSA because he sought the benefits at the Defendant and UNUM's behest.[15] However, the fact that UNUM requested or required the Plaintiff to seek Social Security benefits does not relieve the Plaintiff from his obligation to make true statements under oath. Further,

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these circumstances, the SSA was in a much better position to determine his qualification, and it concluded that the Plaintiff was no longer able to work.

[15] The Plaintiff raises this argument in the context of the doctrine of judicial estoppel. In applying this doctrine, some courts have required the party seeking its application to demonstrate that the other party presented inconsistent positions in bad faith. *See McNemar*, 91 F.3d at 618. However, a number of courts have applied the doctrine in question without invoking judicial estoppel. *See* discussion *supra* at 12-13. Indeed, this Court need not invoke the doctrine of judicial estoppel in determining as a matter of law that the Plaintiff was no longer qualified. *See* discussion *infra* at 24-26.

the Court cannot censure UNUM for having requested or required the Plaintiff to apply for Social Security benefits when it was entitled to a set-off[16] if such benefits were awarded.[17]

In sum, the Court concludes that no reasonable juror could conclude that the Plaintiff was qualified to perform his duties as a bench chemist at Tastemaker. The defendant has produced overwhelming evidence that the Plaintiff was not qualified.[18] This evidence, along with

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[16] The Defendant asserts, and the Plaintiff fails to refute, that UNUM would be entitled to a set-off for the amount of benefits the Plaintiff received from the SSA. The record demonstrates that the Plaintiff did receive "overlapping" benefits from UNUM and the SSA for some time. However, the Plaintiff failed to notify UNUM of this fact or to reimburse UNUM for the amount he received from the SSA. Apparently, the Plaintiff assumes that he is entitled to a double recovery under the circumstances, and perhaps a triple recovery if his ADA claim is successful.

[17] While the record is unclear on this point, the Court also suspects that Tastemaker had legitimate business reasons for seeking to have UNUM pay long-term benefits to the Plaintiff rather than having the Plaintiff remain on short-term disability.

[18] As stated above, the Plaintiff bears the burden of establishing that he was qualified to perform his prior job functions. *See Monette*, 90 F.3d at 1182. In spite of overwhelming evidence that the Plaintiff was not qualified, the Plaintiff offers little evidence to the contrary. The main thrust of the Plaintiff's argument for qualification is that the Defendant failed to reasonably accommodate him, as required by the ADA. *See id.* at 1183. However, the Plaintiff bears the initial burden of proposing an accommodation and showing that the accommodation is objectively reasonable. *Id.* The Plaintiff has failed to identify evidence within the voluminous record that demonstrates that he proposed any type of accommodation to the Defendant.

the Plaintiff's sworn statements to the SSA, prove too much for a reasonable juror to find that the Plaintiff was

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Instead, the Plaintiff cites the suggestions of examining physicians that, ideally, the Plaintiff should be given the opportunity to do job testing to determine whether or not he could still function as a bench chemist. Both parties mistakenly identify this issue as one of accommodation. However, this evidence relates instead to whether the Plaintiff was qualified.

Admittedly, there are questions of fact as to the parties willingness to conduct testing under conditions which were acceptable to both of them. Indeed, it would have been preferable for the parties to have come to an agreement and had the testing done. To be sure, the record suggests that neither party was entirely forthcoming in this regard. However, in light of the Plaintiff's sworn statements to the SSA, the numerous medical records and reports, the conclusions of UNUM and the SSA that the Plaintiff was disabled and their subsequent awards of benefits, and the Plaintiff's co-workers' statements regarding his impairments, the Court concludes that the parties' failure to agree upon job testing is not a material issue in this case.

Finally, the Plaintiff proffers the testimony of Dr. Hans Zimmer, a Ph.D. professor of chemistry at the University of Cincinnati, as evidence of his qualification. Nearly four years after his accident, the Plaintiff conducted chemistry experiments in Dr. Zimmer's lab in an effort to prove that he was still capable of performing bench chemistry. The Plaintiff contends that Dr. Zimmer's favorable review of his efforts in the lab establishes his *prima facie* case regarding qualification. However, the report of Dr. Zimmer must be examined in the context of all the contrary evidence produced in this case, both by the Defendant and the Plaintiff, which suggests that the Plaintiff was not qualified. It is well established that, in considering a motion for summary judgment, "a mere . . . scintilla of evidence in support of the plaintiff's position [is] insufficient, and there must be evidence on which [a] jury could reasonably find for the plaintiff." *Anderson*, 477 U.S. at 252. Under the circumstances of this case, the Plaintiff has failed to meet his burden.

qualified. Therefore, the Plaintiff has failed to establish his *prima facie* case, and the Defendant is entitled to summary judgment on the Plaintiff's discrimination claim.

Finally, the Plaintiff argues that an application of the judicial estoppel doctrine in this case would be inappropriate pursuant to applicable Sixth Circuit precedent. While other courts have utilized the judicial estoppel doctrine to preclude a plaintiff from making inconsistent claims regarding disability[19], this Court agrees that it is unclear whether the doctrine as defined by the Sixth Circuit may be extended to this case. The Sixth Circuit Court of Appeals has recognized that, in order to invoke judicial estoppel, "a party must show that the opponent took a contrary position under oath in a prior *proceeding* and that the prior position was accepted by the *court.*" *Teledyne Industries, Inc. v. N.L.R.B.*, 911 F.2d 1214, 1218 (6th Cir. 1990) (emphasis added). The Plaintiff suggests that, because the Plaintiff's applications with the SSA and UNUM were not part of a "proceeding" in a "court," that the judicial estoppel doctrine does not apply. However, regardless of whether the doctrine of judicial estoppel is applicable in this case, the Plaintiff cannot demonstrate that its theoretical underpinnings are inapplicable. Indeed, a number of courts have applied the doctrine at issue under analogous legal theories. *See, e.g., August*, 981

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[19] *See, e.g., Monette*, 90 F.3d at 1167 (where the First Circuit Court of Appeals rejected the defendant's argument that the doctrine of judicial estoppel did not apply, finding that the "application of judicial estoppel is not limited in the formulaic manner urged by" the defendant).

F.2d at 583 (treating the plaintiff's statements as binding admissions); *Griffith*, 930 F. Supp. at 1169-70 (E.D. Ky. 1996) (where plaintiff's representations "precluded" him from satisfying the elements of his *prima facie* case); *Morton*, 922 F. Supp. at 1182 (N.D. Tex. 1996) (discussing the issue in terms of whether the plaintiff had standing to bring an ADA claim). In sum, the Court finds the doctrine in question to be well reasoned and applicable to the instant case, regardless of its title.

Plaintiff's Retaliation Claim

In his retaliation claim, the Plaintiff avers that the Defendant "failed to facilitate [his] rehabilitation by refusing to consult with physicians offered by [the] Plaintiff who were of the opinion that [he] might be able to perform the essential elements of his job with a reasonable accommodation." Complaint at ¶ 29. The Plaintiff further alleges that the Defendant's failure to act, as well its termination of the Plaintiff's employment, was motivated by the Plaintiff's retention of legal counsel. *Id.* at ¶ 30. The Plaintiff contends that these acts or failure to act constitute unlawful retaliation under the ADA.

In order to establish a *prima facie* case of retaliation, the Plaintiff must demonstrate: (1) that he was engaged in a statutorily protected activity; (2) that he was the subject of an adverse employment action; and (3) that there is a causal connection between the protected activity and the adverse employment action. *See Johnson v. Department of Health and Human Serv.*, 30 F.3d 45, 47 (6th Cir. 1994) (setting forth the retaliation standard in a race and gender discrimination case); *Patterson v. City of Seattle*, 1996

WL 528267, *3 (9th Cir.) (unpublished opinion) (applying the same standard in an ADA retaliation case). If the Plaintiff establishes a *prima facie* case of retaliation, the burden shifts to the Defendant to articulate a legitimate nondiscriminatory reason for the adverse employment action. *See Johnson*, 30 F.3d at 47. Finally, if the Defendant offers a legitimate reason, the burden shifts back to the Plaintiff to demonstrate that the Defendant's explanation is pretext for retaliation. *See id.* However, the ultimate burden of persuasion always remains with the Plaintiff. *See id.*

In the instant case, the Plaintiff first asserts as an adverse employment action the Defendant's "refusing to consult with physicians offered by [the] Plaintiff who were of the opinion that [he] might be able to perform the essential elements of his job with a reasonable accommodation." The Plaintiff asserts this element of his retaliation claim in terms of the Defendant's obligation to provide reasonable accommodation. *See generally Monette*, 90 F.3d at 1182 (setting forth legal standards for "reasonable accommodation"). Indeed, the definition of a Plaintiff's being "otherwise qualified" under the ADA statute encompasses Plaintiffs who would be qualified if provided "reasonable accommodation." *See* 42 U.S.C. § 12112(b)(5)(A). However, the Plaintiff "bears the initial burden of proposing an accommodation and showing that [it] is objectively reasonable." *Monette*, 90 F.3d at 1183.

In the instant case, the Plaintiff has failed to identify one shred of evidence that he or his physicians proposed specific actions which would enable the Plaintiff to return to working in a chemistry lab. Instead, the Plaintiff offers

letters and requests that he be tested to see whether he could continue to do lab work. These requests and the Defendant's responses to them, at best, relate to whether or not the Plaintiff was qualified to work as a bench chemist. The Court has already disposed of the qualification issue in the first section of this order. Furthermore, the Defendant was under no duty to accommodate the Plaintiff because the Plaintiff failed to identify an accommodation which would allow him to continue working as a bench chemist. Therefore, the Defendant's alleged failure to accommodate the Plaintiff cannot satisfy the "adverse employment decision" requirement of the Plaintiff's retaliation claim.[20]

Finally, the Plaintiff alleges that his termination was an adverse employment action which was causally linked to his engaging in protected activity. However, in order for the Plaintiff to succeed, he must demonstrate that his engaging in protected activity was a "significant factor,"

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[20] Despite the Plaintiff's claims to the contrary, the record is replete with the Defendant's substantial efforts to facilitate the Plaintiff's return to work. For example, the Defendant continued to retain the Plaintiff during the time when he indicated a complete lack of engagement or interest in chemistry, provided him with rehabilitation therapy beyond what its insurance carrier would cover, and provided lab technicians to perform experiments under his supervision. Only after these substantial efforts to accommodate the Plaintiff was he finally placed on disability leave. In addition, there is no evidence in the record which suggests that the Defendant would not have continued to employ the Plaintiff in some capacity, had he not strenuously insisted upon being returned to the chemistry lab. Under these circumstances, the Court finds the Plaintiff's claim that he did not receive adequate accommodation to be untenable.

not merely a "causal link," in causing the adverse employment action. *Polk v. Yellow Freight System, Inc.*, 801 F.2d 190, 199 (6th Cir.1986). In the instant case, the Plaintiff has failed to meet this burden.

The Plaintiff filed a complaint with the Equal Employment Opportunity Commission on November 19, 1993. He retained counsel regarding this case in the spring of 1994. Yet, the Plaintiff was not terminated until November 23, 1995. The Plaintiff has failed to produce any evidence that his termination was related to either of the protected activities in which he engaged. Rather, the record demonstrates that the Plaintiff's termination became effective on the date that his long-term disability insurance benefits terminated. In absence of any evidence to the contrary, the Court can only conclude that his termination was causally connected to the termination of his insurance benefits, not the Plaintiff's participation in protected activity. Therefore, the Plaintiff's retaliation claim regarding the termination of his employment also fails.

In sum, the Plaintiff has failed to establish his *prima facie* case for a claim of retaliation, and the Defendant is entitled to judgment as a matter of law.

Conclusion

For the foregoing reasons, the Defendant is entitled to summary judgment on his ADA claims. Having dismissed all claims over which it has original jurisdiction, the Court declines to exercise supplemental jurisdiction over the Plaintiff's state law claims pursuant to 28 U.S.C. § 1367(c)(3). Thus, the Defendant's motion for summary

judgment (Doc. 54) is hereby **GRANTED.** In addition, all other motions pending before the Court in this case are hereby deemed **MOOT,** and this case is **DISMISSED WITH PREJUDICE.**

IT IS SO ORDERED.

/s/ Sandra S. Beckwith
Sandra S. Beckwith
United States
District Judge

Applicable Statutory and Regulatory Provisions

42 U.S.C. § 12101(b)

It is the purpose of this Act:

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent enforceable standards addressing discrimination against individuals with disabilities;

(3) to insure the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the Fourteenth Amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day people with disabilities.

42 U.S.C. § 12102(2):

Disability. The term "disability" means, with respect to an individual –

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

42 U.S.C. § 12111(9).

Reasonable Accommodation. The term "reasonable accommodation" may include –

(A) making existing facilities used by employees readily accessible to and useable by individuals with disabilities.

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

42 U.S.C. § 12112.

(a) **General Rule.** No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) **Construction.** As used in subsection (a), the term "discriminate" includes –

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect

of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this title (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration –

(A) that have the effect of discrimination on the basis of disability;

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability; if such denial is based on the need of such covered entity to make reasonable accommodation to the physical

or mental impairments of the employee or applicant.

29 C.F.R. § 1630(l) (EEOC Rules Implementing the Americans With Disabilities Act)

§ 1630(l) *"Is regarded as having an impairment" means:*

(1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;

(2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitude of others towards such impairment; or

(3) Has none of the impairments defined in paragraphs h(1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.

TASTEMAKER

INTEROFFICE MEMORANDUM

CONFIDENTIAL

TO: Keith Buck

FROM: Tony Dennis

DATE: August 20, 1992

SUBJECT: Return to Active Work Status

As you are aware, it has been your desire and our intention to return you to fully active status to perform organic synthesis experimentation at the bench in the Paquin Building as soon as you are able to perform your job in a safe manner. The purpose of this memo is to summarize our progress to date and outline where we go from here.

Several months ago, I proposed and you accepted a procedure designed to assess your progress, both intellectual and physical, toward resuming the full responsibilities of your position. You successfully accomplished the intellectual steps outlined in that procedure, concluding with the presentation to Larry Robinson and me of the synthesis pathways that you intend to pursue for a number of chemicals identified as being of interest for Tastemaker. Based on this performance, I feel comfortable having you more fully participate in the development of chemical synthesis research programs within Tastemaker.

However, I remain seriously concerned about your abilities to physically handle experimentation in the laboratory in a safe fashion. During your presentation and on other occasions, I observed occurrences of physical

unsteadiness. My observations have been supported by others within the company. Your safety and the safety of our other employees is our paramount concern. As you know, the hazards in OSL are substantial given the handling of toxic and explosive chemicals and potentially dangerous physical processes that require a steady hand and continuous monitoring. Because I believe your physical recovery requires more progress to ensure a safe work environment, I am not as yet authorizing you to physically perform your own experimentation in the Paquin Building.

I have developed a plan to enable you to participate in chemical synthesis research, but avoid the physical requirements of the job that present a safety hazard. I will authorize you to return to your office in the Paquin building and I will provide you with qualified, full-time technical support so that your experimental designs can be implemented and carried out under your supervision. I will expect you to perform all of the tasks required of you in the past as a design chemist including design of experimentation and analysis of data, as well as recommendations for further actions. However, I will require that you maintain strict abstinence of the handling of chemical materials or experimental apparatus in the Paquin Building until further notice. All benchwork and all handling of chemicals and experimental apparatus must be carried out by the technician. I will review your progress and status at the end of this calendar year and at the end of every subsequent twelve month period until such time as I consider you sufficiently able to return to physical experimentation in a completely safe manner.

In addition, I am authorizing Tastemaker Human Resources to provide for additional physical therapy, at the cost of the Company, to continue to improve your ability to deal with the physical work associated with chemical experimentation. Our goal is to achieve further improvement of your physical abilities, which would allow you personally to return to physical experimentation at the bench.

Keith, I value your past contributions and look forward to continuing to work with you. I look forward to receiving your favorable response about the plan described above.

If you have any questions concerning your status or the requirements outlined in this memo, please do not hesitate to contact me.

/s/ Tony Dennis
Tony Dennis

cc: T. Bonar-Stewart

Understood and Accepted by: /s/ Keith Buck
Keith Buck

bcc: K. Durosy

D. Ann Middaugh M.D., M.S.
2727 Madison Road,
Suite 208
Cincinnati, Ohio 45209

[Names and Qualifications Omitted In Printing]

May 4, 1993

Michael E. Connor
Human Resources Manager
Tastemaker
110 E. 70th Street
Cincinnati, Ohio 45216

re: Keith Buck Ph.D.
Independent Medical Evaluation

Dear Mr. Connor:

I have had the opportunity to complete the independent medical evaluation on Keith Buck, Ph.D. The purpose of the evaluation was to assess Dr. Buck's current medical and neurologic condition as it relates to his ability to perform in his occupation as a research and development chemist for Tastemaker. As you know, I made an initial site visit to Tastemaker on March 15, 1993 to meet with you, gather information, meet Dr. Buck and see his laboratory. I performed a comprehensive medical and occupational history, general physical examination, neurological examination and mental status screening examination on March 31, 1993. Based on the findings on the March 31, 1993 evaluation, I recommended consultation with Neuropsychologist Edwin T. Barrett Ph.D. of Aaring Neurology in order to carefully and accurately document Dr. Buck's cognitive status. He was evaluated for 3 hours of testing on April 12, 1993 and another 2 hours of testing on April 22, 1993. I met with Dr. Barrett on April 29, 1993

to review the results. I also presented his case in our Occupational Medicine Clinical Case Conference at the Center for Occupational Health, University of Cincinnati on April 30, 1993.

The results of the March 31, 1993 examination show evidence of global brain damage involving both the right and left hemispheres. There was evidence of significant memory impairment, difficulty in judgment, impaired general thought and organizational processes and impairment in gait and station. The neuropsychologic testing confirms the abnormalities that surfaced on the screening evaluation. Dr. Buck is unable to retain and process new information and has severe memory deficits. He has more difficulty with verbal information and tracking than with non-verbal visual information. His overall reasoning is also impaired. Personality testing did not demonstrate any serious underlying problems. Overall there is diffuse brain damage which has resulted in serious abnormalities in memory, processing of new information, retention of same, and reasoning and judgment. These impairments are permanent. It is unlikely that there will be any significant improvement in the future, particularly given the time elapsed since the injury.

The job of a bench research chemist involves careful sequencing of chemical reactions in a stepwise, methodical and reproductive manner. Dr. Buck is not capable of performing his previous job as a bench chemist in a reliable and safe manner. He would represent a serious safety risk to himself, his co-workers and the surrounding environment. It is my recommendation that Dr. Buck be permanently restricted from any activities involving bench chemistry.

Please do not hesitate to contact me should you have any questions regarding this evaluation or my recommendations.

Sincerely,

/s/ D. Ann Middaugh M.D., M.S.
D. Ann Middaugh M.D., M.S.
cc: E. Barrett, PhD

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the past year likely reflect stabilization which has occurred in the prefrontal lobe structures.

Dr. Buck is a very bright man. While he seems to appreciate the changes which have occurred since his head injury, I am not certain that he fully appreciates the marked difficulties he is having with verbal learning and memory. In view of his cognitive deficits, I seriously question [sic] he can function as a bench chemist. Unfortunately, what we find in our laboratory, does not always generalize perfectly to work settings. I suspect that Dr. Buck has retained volumes of procedural knowledge and basic chemistry which have accumulated over the years. The ultimate criterion as to whether he can function as a bench chemist is to assign a job coach who can closely observe and work with Dr. Buck in the laboratory for a trial period. While I anticipate he will show major problems, I feel that given his stellar record, reputation and

desire, an ecologically valid assessment in the laboratory is warranted.

Confounding his optimal functioning at present are the threats, challenges and cajoling from his wife. I suspect that Dr. Buck can accept the fact that he might not be able to return as a bench chemist much better than Mrs. Buck can. Besides the risk of possibly losing his bench chemistry position, his marriage also seems to be in jeopardy. There seems to be little interest at this time in marital therapy. I have given Dr. Buck the name of an excellent therapist who can work with the Buck's if they choose.

Thank you very much for the opportunity to evaluate Dr. Buck. If you have any questions regarding the test findings or my clinical impressions, please feel free to call me at 559-5013.

Sincerely,

/s/ Edwin T. Barrett, Jr.
Edwin T. Barrett, Jr., Ph.D., ABPP/ABCN
Diplomate in Clinical Neuropsychology
ETB:jd

Bethesda

REHABILITATION PLAN FOR DR. BUCK

1. Dr. Buck demonstrated difficulty with speed of processing verbal information needed to be stored in memory for later retrieval.

   Dr. Buck will demonstrate the ability to store and retrieve information within the average range with respect to speed of processing,

The utilization of computer memory task with the dependent variables of percentage of accurate recall and speed, verbal memory agility tasks as developed by the therapist, and the use of encoding strategies to assist in the organization of new information consist of the procedures needed to attain this objective.

2. Dr. Buck needs to demonstrate his competence in developing chemical reaction pathways, executing synthesis, making plans for production, mixing various chemicals, setting up apparati appropriately, and observing the reactions.

   With the assistance of his employer Dr. Buck will demonstrate his competence in the above. We will ask the employer to provide a sample project which will require Dr. Buck to fulfill the above requirements. The employer will be asked to provide specific feedback regarding Dr. Buck's performance as it relates to the above tasks,

The above tasks are expected to be accomplished by December 13, 1993.

James J. Anthony, M.D.
Neuropsychological Evaluation
RE: KEITH BUCK
September 23, 1993

Page 3

REASONING: Dr. Buck shows an uneven performance on several measures of abstract reasoning and problem-solving. On a problem-solving task emphasizing visual/spatial analysis and trial-and-error learning, he performs in the very superior range. On a card-sorting task, which

emphasizes verbal/linguistic mediation in the identification of relevant stimulus dimensions, he performs in the average range, tends to perseverate errors, and lose his place. Encouraged to persevere and redirected, Dr. Buck is able to learn this task. On a path-finding test his performance is accurate, goal-directed, and efficient. The Stroup Color Word Test reveals adequate ability to direct and focus his thinking at a level I standard deviation below average. In summary, his reasoning can be slow and inefficient, but if given time and encouragement, Dr. Buck can demonstrate adequate problem-solving.

PERSONALITY: Personality status was evaluated with the SCL-90-R. The profile is mostly within normal limits, except for elevations on somatization, and borderline on sensitivity. This profile is entirely consistent with his actual medical history and condition. It is remarkable to some degree that measures of depression and anxiety are so normal. As a result of frontal lobe injury, Dr. Buck may, in fact, be less apprehensive and worried than may be warranted by his condition.

SUMMARY AND RECOMMENDATIONS: Dr. Buck's condition is apparently stable at this time. Further spontaneous improvements in his cognition are not likely to occur. This leaves his with focal deficits in verbal/linguistic memory, and mild deficiencies in problem-solving and speed and efficiency of thinking. With these deficits clearly stated, it must be added that Dr. Buck remains quite competent in many areas. He is probably not capable of returning to his job as an active bench chemist, where he is responsible for the ongoing daily conduct of research. However, with his wealth of information and experience, which are still readily available to him, and

with his intact language, it is quite possible that he could function effectively as a research consultant, a teacher, and a writer. Whether he could find a job description in his field which would allow him to capitalize on these residual assets is another question. Whether his employer could define a job title which would allow him to function in these areas would, of course, have to be addressed by Tastemaker. As well noted in Dr. Barrett's report, the ecological validity of psychometric tests, especially in highly functional and educated individuals, may be less than optimal. He may be able to do things on sight which could not be predicted on the basis of these data. Therefore, I concur with Dr. Barrett that a trial at his former job, with appropriate coaching or assistance, would certainly be worthwhile. The Bucks seems to feel that that option has now been exhausted, and they are considering what course to follow from here. In interview it seems that Mrs. Buck is the more anxious of the two about the eventual outcome. I have recommended that they pursue marital counselling in order to help them find their way through this difficult time.

Thank you for the opportunity to evaluate Dr. Buck,

Sincerely yours,

/s/ Michael F. Hartings
Michael F. Hartings, Ph.D.

fields were full. Cerebellar testing revealed some slightly decreased coordination in the left upper and lower extremities. This consisted of serial finger-tapping and toe-tapping on the left. Rapid alternating movement and other cerebellar testing were perfectly normal bilaterally. Mr. Buck demonstrated a negative Romberg's test even with physical threat with eyes closed. He did have some trouble standing on one foot or the other. He had some difficulty as well with tandem walking, especially backwards. Gait was slightly unsteady although certainly not ataxic. On mental status testing, he was able to recite seven digits forward and five digits backward with very little difficulty. Abstraction was perfectly intact when presented similarities. He was able to remember only two of four objects at five minutes and he was able to recite the other two objects, one with prompts and the other with a list. At ten minutes he was able to recall only one of four objects and required a list on the other three objects.

Assessment: Traumatic brain injury manifested primarily by cognitive deficits.

Discussion: My examination and review of the records is basically consistent with evaluations that have been done over the past year. Mr. Buck demonstrates minimal physical problems to me and at least during the short time of my interview is behaviorally appropriate. Review of the neuropsychological testing as well as brief testing in the office today do reveal significant memory deficits. I concur with other evaluators however that an on-site

evaluation in Dr. Buck's former job is not unreasonable. I would suggest this be done with a job coach or otherwise qualified person supervising his performance in the lab setting.

I had an extensive discussion with Dr. Buck and his wife today that if he is unable to adequately perform in a job coached situation in his former position, we must consider other vocational options. It is very encouraging that he has had a vocational evaluation by Ms. Taylor. I look forward to examining her evaluation. If Dr. Buck is not able to return to his former position, we need to work closely with a vocational counselor on the case and identify other vocational avenues for retraining or other placement that might be appropriate.

/s/ Michael W. O'Dell, M.D.
Michael W. O'Dell, M.D.
MWO/mjs Trans: B:BUCK/1-4-94

Schwarty, Manes & Ruby

A LEGAL PROFESSIONAL ASSOCIATION
2900 CAREW TOWER
441 VINE STREET
CINCINNATI, OHIO 45202-3090
TELEPHONE 513/579-1414
TELECOPIER 513/579-1418

[Names Omitted In Printing]

May 4, 1994

Dr. Anthony J. Dennis
Vice President
Research & Development
Tastemaker, Inc.
1199 Edison Drive
Cincinnati, Ohio 45216

RE: **Dr. Keith Buck**

Dear Dr. Dennis:

Our office has been retained to represent Dr. Keith Buck with regard to his separation from employment in May, 1993. Please refer all correspondence and other communications directly to me.

Dr. Buck has relayed to me in detail the events surrounding his termination of employment from Tastemaker as a chemist after fourteen years of employment. As you know, Dr. Buck suffered a serious head injury back in September of 1991 while on a business trip. After he recovered, he was accepted back to work in February, 1992, on a full-time basis. Tastemaker discharged Dr. Buck on May 27, 1993, on the questionable assumption that he could not longer perform the bench chemistry

functions of his job. In so doing, Tastemaker relied exclusively on a report of Dr. Deborah Ann Middaugh, an occupational and environmental physician. Dr. Middaugh unqualifiedly recommended my client for termination irrespective of the fact that he had never been given an opportunity to demonstrate his ability to perform bench chemistry. She even ignored the recommendation of Dr. Edwin Barrett, the neuropsychologist with whom she consulted, that Dr. Buck be given an opportunity, with job coaching, to perform bench chemistry.

Since his discharge, Dr. Buck has presented Tastemaker with the medical opinions of other neuropsychologists who echo Dr. Barrett's sentiment that he should have been given an opportunity to perform bench chemistry on a trial basis. However, Tastemaker has ignored all of this input.

The Americans With Disabilities Act, 42 U.S.C. 12101, as well as Section 4112 of the Ohio Revised Code, clearly prohibits an employer from discriminating against employees on the basis of their disability, provided they can perform the essential functions of their jobs with or without reasonable accommodation. After review of all of the medical and psychiatric records before us, it would appear that Dr. Buck is capable of performing all aspects of his job as a chemist for Tastemaker, Inc. At minimum, Tastemaker abruptly and unlawfully discharged Mr. [Dr.] Buck without making any attempt whatsoever to determine whether he could perform his job with or without reasonable accommodation.

We, of course, are aware that Tastemaker did not discharge Dr. Buck altogether but placed him on a disability leave which allowed him to participate in Tastemaker's long-term disability policy. While we appreciate the gesture, this is not a long-term solution to the problem. UNUM, Tastemaker's long-term disability carrier, apparently shares our concern that Dr. Buck is not disabled after all, and seeks to schedule him for further tests to see whether he can perform the functions of chemist. If he is determined to be able to perform these functions, he will be taken off of long-term disability and left highly vulnerable. Given Dr. Buck's age and the state of the economy generally, it is highly doubtful whether he could obtain any equivalent employment elsewhere in his field, much less at the salary level he enjoyed while working for Tastemaker.

At this juncture, Dr. Buck would rather not initiate a protracted and expensive lawsuit. All he wants is an opportunity to return to work and demonstrate that he can do his job. I would like to work out an arrangement whereby Tastemaker would put Dr. Buck back on the payroll immediately, and be examined by an independent occupational specialist mutually acceptable to both sides. This doctor would conduct appropriate studies to determine whether Dr. Buck can do his job with or without reasonable accommodations. There also remains the matter of making Dr. Buck whole for the monetary losses he has suffered since May of 1993.

Dr. Buck is anxious to resolve this dispute as soon as absolutely possible. I look forward to hearing from you no later than the close of business Friday, May 13, 1994,

as to whether you are amenable to a solution as suggested above. As you know, Dr. Buck has already filed handicap discrimination charges with the Equal Employment Opportunity Commission. If we are unable to work this matter out amicably, we shall obtain a right-to-sue letter from the EEOC and commence litigation in federal court.

I certainly hope it doesn't come to this and look forward to your response by May 13.

Very truly yours,

SCHWARTZ, MANES & RUBY

/s/ Donald B. Hordes
Donald B. Hordes

DBH:jen

cc: Dr. Keith Buck

bcc: Herb Bass, Esq.

Keith T. Buck
12/23/93
Page 11

reports, accuracy and precision in editing reports, ability to relate technical knowledge to operating problems, ability to present and relate abstract ideas by means of symbols, and clear verbal expression.

Unfortunately, due to the advanced cognitive functioning required by his position, I am unable to determine whether or not Dr. Buck has recovered to the point that

he is currently able to resume his prior job responsibilities, either in a full or modified basis, and whether it would be safe for him to do so. Residuals exist, but their extent could not be determined based upon the limited information available to me at this time.

There are alternative two methods of making this determination. The first would entail a closely supervised trial work period in the laboratory. The second would be a comprehensive head injury evaluation in which the cognitive demands of his occupation could be tested, and simulated to some degree. The nearest recognized facility that could provide this type of evaluation is at Miami Valley Hospital in Dayton, Ohio, approximately 50 miles from Dr. Buck's residence. Their evaluation would entail assessment three hours daily, five days weekly for a period of two weeks at a cost of $2,300. Should you wish to pursue this further, please contact:

Jan Seigel, Admissions Coordinator
HIRE Program
Miami Valley Hospital
One Wyoming Street
Dayton, OH 45409-2793
513/220-2570

Dr. Buck is consulting with Dr. Michael O'Dell on 1/3/94, and Dr. O'Dell may offer further insight and/or recommendations into Dr. Buck's condition and rehabilitation.

The Bucks have requested that I ask that UNUM fund additional cognitive retraining and marital counseling due to their limited health insurance coverage. I informed them that such benefits are not provided under LTD coverage, but the adjustment counseling and additional

cognitive training such be covered under his Workers' Compensation claim, once that is allowed. I suggested that reputable head injury programs outside the Cincinnati area, such as St. Francis in Green Springs and Miami Valley in Dayton, be carefully considered rather than staying with local facilities based upon convenience, (under Ohio Workers' Compensation, Dr. Buck has full choice of his treating physicians and medical facilities).

Thank you for allowing me [to] meet with Dr. and Mrs. Buck to conduct the initial interview. Please let me know if I may be of further assistance.

Sincerely,

/s/ Donna B. Taylor
Donna B. Taylor, CRC, CIRS, CCM
Licensed Professional Counselor

Donna B. Taylor
CRC, CIRS, CCM, CVE
Licensed Professional Counselor
Diplomate, American Board of Vocational Experts

[Address Omitted In Printing]

June 30, 1994

Wendy J. Gimbel, Rehabilitation Coordinator
UNUM Life Insurance Company of America
Mid Atlantic Regional Benefits
P.O. Box 2031
Tarrytown, NY 10591-09031

Re: Keith T. Buck, DOB: 04-01-1940
Claim Number: 3532652734
Policy Number: 502138-101

Dear Ms. Gimbel:

During the past month, I have met with Dr. Emel Yakali, Chemistry Professor at the University of Cincinnati. (Dr. Bob Galey was unable to attend as he [w]as too busy to become involved in this project.) We discussed Dr. Buck's case in detail, and I have provided her with two copies of all the medical records, psychological reports, and the job description in the file. We discussed the cognitive deficits caused by Dr. Buck's head injury, reviewed the job description, and I explained the role of vocational rehabilitation.

Dr. Yakali indicated that she was very busy, but would try to review the reports more closely over the next few weeks. She stated that, if she were able to assess Dr. Buck's ability to perform in the field of chemistry, it would not be until mid-August. She was hesitant to make a commitment on this evaluation, but I suggested that she

would be the best person in the community to perform this service as she could provide an objective accurate assessment of his abilities, as she does with her students.

I have also contacted others to determine if any alternatives for a job simulation exist. Dr. William Hekle, who is also a Ph.D. Chemist in the private sector, indicated that he did not feel anyone outside of the former employer or the University of Cincinnati could make an accurate assessment of Dr. Buck's abilities to perform his prior job. He suggested that not only would there be liability by other laboratories, but they also may not be as specialized as would be necessary, and they may not be objective.

On 6/22/94, I met with Dr. and Mrs. Buck at their home to introduce the possibility of alternative employment for Dr. Buck, should it be determined that he is unable to resume his former employment as a Bench Chemist with Tastemaker. Dr. Buck presented more favorably, was more talkative and did not exhibit any unusual behaviors.

Initially, Dr. Buck indicated he would attend an assessment at the University of Cincinnati, but his wife objected. She was insistent that any simulation or assessment be performed at Tastemaker, and this should be conducted by allowing Dr. Buck to return to work and observe him while he was being paid to perform his duties. I kept asking Dr. Buck that if this was not an available option, what he would suggest. He even mentioned assessment by the University of Cincinnati, but his wife objected. In the end, however, he stated that he would cooperate if this should prove to be an option.

However, he did have reservations, which were mentioned in a two page written statement which he read to

me. To summarize this statement, he felt that any job simulation would be "ridiculous" as his position was too complicated, and that the multi-step procedures could not be assessed. In addition, all factors could not be simulated and were too technical to be reduced to assessment outside of the actual job setting.

A lawsuit against Tastemaker was to be filed within two weeks by their attorney, Donald Hordes. He had written to the company and requested that they allow Dr. Buck to return to work, while having an occupational therapist present with others to study and determine if he could do his job with or without reasonable accommodations. This letter was sent on May 4, 1994, and they had received no response to date. He apparently had called Tastemaker's attorney, and Mrs. Buck indicated that she (the attorney) had "laughed" about their case. Dr. Skutter, a Vocational Expert, met with Dr. Buck at Attorney Hordes's office, but the results were unknown.

Interestingly enough, Dr. Buck indicated that he has lost interest in the field of chemistry. However, he is adamant that he is capable of performing his former duties as Bench Chemist, even after we reviewed and discussed Dr. Tureen's report which discussed his cognitive liabilities.

However, Dr. Buck did eventually begin to discuss possible alternative employment in which he could use his skills and knowledge in chemistry. These included positions performing theoretical research, literature searches, plan synthesis, writing chemical abstracts, and teaching chemistry. He taught at Dickinson College in Pennsylvania from 1966 through 1968 and at the University of Idaho from 1968 through 1969. He stated that teaching was

satisfactory, but he saw no future in it. He had reservations about other employment based upon the low rate of pay he was likely to receive.

Another problem is that Dr. Buck would be penalized if he retired from Tastemaker before age 55 (is currently 53). Therefore, he is most likely not to consider accepting other employment.

They also questioned the agenda of UNUM in offering rehabilitation services. Apparently they met an attorney who stated that he had sued UNUM in the past and won several claims. Therefore, they are skeptical of current, rehabilitation efforts unless they were directed toward returning Dr. Buck to his original position of employment.

The Bucks would like Tastemaker to allow Dr. Buck to return to work, if not to his prior job, to another position within the company. He thinks that he may require a laboratory assistant, but he is confident that he can do the work. However, this is questionable based upon my review of the medical/psychological reports in the file.

At this time, I am awaiting further instructions before proceeding further on this file. Should Dr. Yakali agree to assess Dr. Buck, I question whether he will accept her findings. As we are currently unable to have an assessment performed onsight at Tastemaker, I have no further recommendations on how to proceed in this matter. It does not appear that Dr. Buck would be receptive to placement with another employer, even if he were determined unequivically unable to resume his former employment.

Please let me know if I may be [of] further assistance. I am looking forward to hearing from you with further instructions.

Sincerely,

/s/ Donna B. Taylor
Donna B. Taylor, LPC, CRC, CCM, CIRS
Certified Vocational Evaluator
Diplomate, American Board of Vocational Experts

DBT/lmm
Enclosure

Donna B. Taylor
CRC, CIRS, CCM, CVE
Licensed Professional Counselor
Diplomate, American Board of Vocational Experts

[Address Omitted In Printing]

August 30, 1994

Wendy J. Gimbel, Rehabilitation Coordinator
UNUM Life Insurance Company of America
Mild Atlantic Regional Benefits
P.O. Box 2031
Tarrytown, NY 10591-9031

Re: Keith T. Buck, DOB: 04-01-1940
Claim Number: 3532652734
Policy Number: 502138-101

Dear Ms. Gimbel:

Since my last report of June, 30, 1994, I have made multiple attempt to speak with Dr. Emel Yakali of the University

of Cincinnati regarding a job simulation assessment of Dr. Buck. As we discussed, I finally spoke with Dr. Yakali in detail on 8/18/94. She indicated that she felt it would be very difficult to assess whether or not Dr. Buck could resume his former lab duties based upon the information in the file. Even though he has impaired cognitive functions, he still possesses superior intelligence, and may be capable of at least some aspects of the job. Further, reports indicate that some cognitive areas, such as memory, continue to improve.

She felt that the tests administered to Dr. Buck may not reflect his actual abilities in the laboratory which could not be assessed outside of the laboratory setting. In order to determine his ability to function in this area, she stated that a synthetic organic chemistry lab must be in the process of performing certain research. This is currently not being performed at the University of Cincinnati, and therefore, she is unable to test his abilities.

Dr. Yakali referred me to the American Chemical Society at 800/227-5588, or suggested I contact chemists that are heavily involved in synthetic organic research.

Since this time, I understand that you have talked with Dr. Buck, and he does recognize now that he is unable to resume his prior duties in the lab. Further, you have made contacts with Tastemaker regarding alternate employment within their corporation. Certainly, return to work at Tastemaker in a suitable position would be the best possibility for Dr. Buck.

At this time, I will hold my file in abeyance pending further instructions from your office. As I mentioned, I will be out of the office from August 31 through September

16, 1994. Should any significant developments occur during that time, please leave a message for me and I will call you upon my return. I commend you on your work with Dr. and Mrs. Buck in helping them accept his limitations so that they may go on with their lives. I enjoy working with you, and look forward to hearing from you soon.

Sincerely,

/s/ Donna B. Taylor
Donna B. Taylor, CRC, CIRS, CCM, CVE, NCC
Licensed Professional Counselor
Diplomate, American Board of Vocational Experts

DBT/lmm
Enclosure

University of Cincinnati

[Address Omitted In Printing]

August 21, 1995

Donald B. Hordes, Esq.
2900 Carew Tower
441 Vine Street
Cincinnati OH 45202-3090

Dear Mr. Hordes:

Re: Evaluation of Kr. [Dr.] Keith Buck

1. The Project

In order to evaluate Dr. Buck's competency as a chemist. I selected a research project with which I was very familiar.

Specifically, it was the synthesis of 3.3′-Dibromomethyl-2-2′-bithienylene starting with commercially available 3-methyl-thiophene (see Figure 1).

The project was done earlier by a number of my MS and Ph.D. students in partial fulfillment of their thesis requirements; thus, it needs considerable skill to successfully complete the synthesis. As preparation for the outlined synthesis (Fig. 1), I had Dr. Buck do the needed literature research. He did this by himself at the Chemistry-Biology Library of the University of Cincinnati. He did a good job in finding and extracting the needed literature references from the original literature using *Chemical Abstracts* and *Beilstein Handbook of Organic Chemistry.*

2. Laboratory Work of Dr. Keith Buck

He did the chemical synthesis for this project in one of my research laboratories (Crosley 806). During this time one or two German Exchange Students who are working on a Master's Degree were also working in this laboratory. They were instructed by me not to assist him in any way. I restricted my supervision to occasional lab visits and checking on proper setup of reaction vessels. He showed skill and worked competently. I might mention that his work was not facilitated by the fact that all lab benches and cabinets were labeled in German. This is due to the fact that the 1994-95 Academic Year was the 12th consecutive year that Germans are working on Master's theses in this laboratory.

Though Dr. Buck worked with highly dangerous chemicals, like elemental bromine, he never represented a hazard for the two students working in the same laboratory. I would like to mention that he also did not break a single reaction flask during his six weeks stay in Crosley 806.

After completing Steps 1 and 2 of the outlined synthesis he ran into unexpected trouble.

Step 3 of the project, namely, the side chain bromination is a "free radical" reaction. Such reactions need an initiator, which for this particular reaction type is AIBN (azobisisobutyronitrile). Unfortunately chemical supply companies do not carry this chemical anymore because of its limited shelf life and potential hazards involved with this compound. I found a small amount of AIBN in one of my refrigerators and advised Dr. Buck to use this material since it still looked "pretty good." The outcome of running the reaction with this material did not give the desired 3.3'-dibromomethyl-2.2'-bithienylene but rather a mixture of many unidentifiable compounds, as shown by him through a thin layer chromatographic test (TLC). I then advised him to try to purify the AIBN and to rerun Step 3.

He did this, but the material again failed to initiate the side-chain bromination. Again by TLC he showed that he did not obtain the desired compound but rather a mixture. Through a skillful column chromatographic separation of this material, he was able to separate the compound which gave the major spot on the TLC-chromatogram and obtained a ^{1}H-NMR spectrum of this compound. Since only persons who take a short course on NMR spectra are permitted to use the instrument the

spectra were taken by one of my graduate students or by a visiting scholar. It was Dr. Buck, however, who, through interpretation of this spectrum found the solution of this unexpected result, namely that instead of side chain bromination nucleus bromination at the 5 and 5′ position took place. This structural assignment was further confirmed by a mass spectrum of this, as he named it, "Mystery Compound."

3. Summary of Evaluation

Dr. Buck proved to me that he is a competent chemist; that he can do a synthetic sequence; that he works safely, obeying all safety regulations; and best of all, if the reaction did not give the expected result, he digs in and finds out what actually happened. Thus, in my opinion he did solid work with me and I have no doubts whatsoever that given the opportunity he will perform on a Ph.D. level in the lab and in obtaining background literature work for high caliber chemical syntheses.

/s/ Hans Zimmer
8/21/1995

DEPOSITION OF MICHAEL CONNER

[p. 252] Q. And you did not instruct – or did you instruct anyone else in human resources, either Teri Bonar-Stewart or Dan Lesh or anyone else in the company, about the fact that Dr. Hasting's name had been brought up by Dr. Hellgren?

A. I don't recall.

Q. Did you talk to the Bucks about the fact that you understood that they had been seeing a Dr. Hasting?

A. No. But, you've got to understand the timing here. I mean, we're now at a point where the Bucks are pursuing a compensable claim under Workers' Comp. We had been told that the Bucks have sought counsel to assist them in this matter. At some point nearing this time, there's an EEOC charge, and we were doing everything we could to limit our conversations with the Bucks on any of these matters. It would have been inappropriate for me to go back and call them concerning this.

Q. Even though you earlier expressed that one of the primary goals of the company during short-term disability was to work with Keith and find out when he could come back to work, and work with his doctors, correct?

A. Absolutely. But, I also stated that it's not my responsibility to administer Keith's rehabilitation program.

MS. HARVEY: May we take a break for a second?

[p. 253] MR. HORDES: Yes, sure.

(Whereupon, a recess was taken from 11:53 a.m. to 11:56 a.m.)

MR. HORDES: On the record. Is there anything you want to change or modify in your answer since you went off the record?

MS. HARVEY: Do you want the question read back?

THE WITNESS: Sure.

MR. HORDES: Read back the question.

(Whereupon, the last question and answer were read by the reporter.)

BY MR. HORDES:

Q. I'm asking, you wanted a break to confer with counsel. Are you standing by that answer? Because if you are, I'll move on to something else. If you want to change it, let me know.

A. No, the answer stands. The point was, we had reached the point of an adversarial relationship, and we had been going on for some significant amount of time trying to work with the Bucks in order to assist him rehabilitating, and had more than once indicated an interest in working with his physicians. And now the relationship had deteriorated to an adversarial one.

[p. 254] Q. I think you testified that – I'm looking at Exhibit Number 47, the first pages. Back on 9/1/93, Hellgren "directed Keith to release Schroeder to work with us." Between that date and 10/5/93, did you ever have any further contact with Dr. Hellgren as to whether, in fact, Schroder had been released?

A. I have no recollection of talking with him between those two times.

Q. Did you talk to anyone else, such as the Bucks themselves, to find out whether they had released Dr. Schroeder?

A. I don't recall having a conversation with the Bucks during that period of time.

Q. Did you instruct anyone else, or did you have any conversation with anyone else, even including Dr. Schroeder, as to whether Dr. Buck had released Dr. Schroeder – well, had authorized Dr. Schroeder to release the records?

A. I don't recall any other conversations.

Q. So, is it a fair statement, then, as of 10/5/93, when you were first made aware of Dr. Hasting, that you were still in the dark as to whether Dr. Buck had released or had authorized Dr. Schroeder to release any information?

* * *

[p. 261] that you didn't explore these topics?

MS. HARVEY: Objection. He already stated, apart from these notes, he has no independent memory of this conversation.

MR. HORDES: I know that, but I'm entitled to ask him questions about other topics.

A. Let me go head [sic] and say to you that I was concerned about saying anything to Keith, because we

had knowledge that he was pursuing an adversarial relationship. I wasn't going to ask Keith a lot of questions about his personal situation. I was responding and returning his call, responding to his inquiries.

BY MR. HORDES:

Q. Did you talk to Dr. Buck during this conversation about the fact that he might have seen a Dr. Hasting?

A. I don't recall talking to Keith about anything other than what's noted in this memo.

Q. All right. On to the next exhibit, an exhibit which has already been marked as Exhibit 36 from a previous deposition. I think you have that. It's in another stack. And forgive me, because I guess this is out of chronological order. I've been trying to go in chronology as much as I can, but apparently I've goofed up here. This goes back to

* * *

Supreme Court, U.S.
FILED
AUG 26 1998
OFFICE OF THE CLERK

No. 98-60

In The

Supreme Court of the United States

October Term, 1997

KEITH BUCK,

Petitioner,

vs.

FRIES & FRIES, INC. and HERCULES FLAVOR, INC. d/b/a TASTEMAKER,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Should the duty to accommodate a "regarded as" disabled employee within the meaning of the americans with disabilities act encompass a duty to afford him an opportunity to undergo particularized on-site testing at his place of employment in order to demonstrate that he can perform the essential elements of his job?

STATEMENT PURSUANT TO RULE 29.6

Petitioner named multiple entities in his original action. Fries & Fries was Petitioner's original employer. It's business was transferred to a joint venture known as "Tastemaker" that it co-owned with Hercules Flavor. Tastemaker was purchased on March 31, 1997 by an affiliate of Roche Holding, Ltd., a Swiss company, Hoffman LaRoche, USA, and now operates under the name "Givaudan Roure." Respondents have no material interest in any nonwholly owned subsidiaries.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	iv
Statement of Jurisdiction	1
Statement of the Case	1
Reasons for Denying the Writ	13
I. The Petition For Certiorari Should Be Denied Because The Issues Raised By Petitioner Are Not Appropriate For Review By This Court.	13
A. The Petition for Writ of Certiorari Should Not Be Granted Because Petitioner's Argument Is Based Solely On A Misinterpretation Of The ADA's Accommodation Provisions.	13
1. The Sixth Circuit Correctly Concluded that Particularized On-Site Testing To Determine The Ability Of An Employee To Perform The Essential Functions Of The Job Is Not An Accommodation Under The ADA.	15

Table of Contents

Page

2. The Cases Cited By Petitioner Do Not Strongly Suggest That Particularized On-Site Testing Would Be A Reasonable Accommodation. 17

3. The Medical Evaluations That Petitioner Relies Upon, When Reviewed In Full, Support The Conclusion That Petitioner Was Not Otherwise Qualified To Resume His Position As a Research Bench Chemist. 21

B. The Petition For A Writ Of Certiorari Should Not Be Granted Because, Even If Particularized On-Site Testing Is Held To Be An Accommodation Under The ADA, Tastemaker Conducted Sufficient On-Site Testing Of Petitioner To Determine He Was Unable to Perform The Essential Functions Of His Job. 23

Conclusion 25

TABLE OF CITED AUTHORITIES

Cases Cited: *Page*

Buck v. Fries & Fries, Inc., et al., No. 97-3093 (6th Cir. 1998) 2

Cook v. State of Rhode Island Dept. of Mental Health, Retardation & Hosps. 10 F.3d 17 (1st Cir. 1993) ... 18

EEOC v. The Chrysler Corp., 917 F. Supp. 1164 (E.D. Mich. 1996) 19

EEOC v. Texas Bus Line, 923 F. Supp. 965 (S.D. Tex. 1996) 19

Kocsis v. Multi-Care Management, Inc., 97 F.3d 876 (6th Cir. 1996) 14

Maddox v. Univ. of Tenn., 62 F.3d 843 (6th Cir. 1995) 13

Monette v. Elec. Data Sys. Corp., 90 F.3d 1173 (6th Cir. 1996) 13

School Bd. of Nassau County v. Arline, 480 U.S. 273, 94 L. Ed. 2d 307, 107 S. Ct. 1123 (1987) 17, 18

Southeastern Community College v. Davis, 442 U.S. 397, 405, 60 L. Ed. 2d 980, 99 S. Ct. 2361 (1979) 19

Table of Cited Authorities

Page

Statutes Cited:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2101(c) 1

42 U.S.C. § 12111(9) 16

Ohio Revised Code § 4112.02(A) 12

Rule Cited:

Sup. Ct. R. 10 13

Other Authorities Cited:

29 C.F.R. § 1630.2(o)(1)(ii) 16

29 C.F.R. § 1620.2(o)(2) 16

The Respondents request that this Court deny the Petition for a Writ of Certiorari seeking review of the decision and judgment of the United States Court of Appeals for the Sixth Circuit entered on April 3, 1998. The Sixth Circuit affirmed an earlier judgment entered by the United States District Court for the Southern District of Ohio, Western Division on December 29, 1996, granting summary judgment to Respondents on all of Petitioner's Americans with Disabilities Act ("ADA") claims.

STATEMENT OF JURISDICTION

Jurisdiction to review a judgment entered by a court of appeals is conferred upon this Court by 28 U.S.C. § 1254(1). In order to be considered timely, a Petition for a Writ of Certiorari must be filed within ninety (90) days from the entry of judgment in the court of appeals. 28 U.S.C. § 2101(c). Judgment for Respondents in this case was rendered by the Sixth Circuit on April 3, 1998. Therefore, the July 2, 1998 Petition for Writ of Certiorari was timely filed.

STATEMENT OF THE CASE

On February 26, 1979, Petitioner Dr. Keith Buck ("Petitioner") was hired as a research bench chemist by Respondent Tastemaker ("Tastemaker"). Tastemaker was, at all times relevant to this action, engaged primarily in the research, development and manufacture of flavorings for the food and beverage industry. As a research bench chemist, Petitioner engaged in bench research, developing new organic synthesis pathways for the creation and manufacture of chemical ingredients to be used in food and beverage flavoring.

Once Petitioner developed a new synthesis pathway, he then designed, implemented and supervised laboratory experiments to test the product. Often, these experiments were potentially dangerous, involving the use of volatile materials that could be explosive when mixed with air. The laboratory work also involved the use of energy sources producing extreme heat and cold.

In 1986, Petitioner was promoted to the position of senior bench chemist largely as a result of his ability to develop creative organic synthesis combinations. Petitioner's creative problem solving ability was

valued both by Tastemaker, and by his colleagues. Frequently, other bench chemists would use Petitioner as a sounding board for their ideas and experimental designs, seeking his advice and guidance in matters of organic chemistry. Petitioner also routinely consulted with Mr. Tony Boeing, the Manager of Chemical Manufacturing, to assist in transitioning newly developed materials from the laboratory to mass production.

On September 12, 1991, Petitioner fell, hitting the front of his head on a concrete sidewalk as he exited an automobile in which he had been riding as a passenger. He suffered a skull fracture and a subdural hematoma, which required emergency surgery and left him with significant cognitive impairments. (App. 331). Petitioner was hospitalized for about a month, during which time his condition was evaluated by Dr. Robert Tureen, a neuropsychologist who administered numerous tests to determine the extent of Petitioner's injuries. The results of Dr. Tureen's examination were cited in a report dated October 4, 1991, wherein he concluded that Petitioner had severe cognitive deficits:

> . . . [Petitioner] is an individual who has both severe memory deficits, as well as significantly impaired novel problem solving ability. Characteristic of the memory problems is a high degree of confabulatory activity, with no awareness of the inappropriateness of the material. . . .

(App. 298).[1] "Confabulatory activity," as defined by Dr. Tureen, referred to the act of making up information to compensate for a lack of memory recall. Apparently, Petitioner would resort to inventing information he was unable to remember.[2] Dr. Tureen also evidenced a concern that Petitioner would not be able to function independently as a result of his memory problems, and he suggested that Petitioner consider a transitional living situation upon his release from the hospital. In his deposition, Dr. Tureen testified that, in his opinion, Petitioner was not ready to return to work in October 1991. (App. 1633).

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1. Because the Appendix submitted by Petitioners contains only selected pages of the medical reports and other source documents, citations to "App. __" refer to the joint appendix filed in *Buck v. Fries & Fries, Inc., et al.*, No. 97-3093 (6th Cir. 1998).

2. Also symptomatic of Petitioner's injuries was his inability to recognize, understand and accept his cognitive limitations.

Despite Dr. Tureen's evaluation, Petitioner returned to work at Tastemaker on October 21, 1991.[3] Originally Petitioner returned "without restriction" because his treating neurologist, Dr. James Anthony, supplied him with an unrestricted return to work letter. Although no requests for accommodation were made by Petitioner or any of Petitioner's physicians, it was readily apparent to Petitioner's colleagues that he was not able to resume his former bench chemistry responsibilities.

According to employees who worked with Petitioner prior to his injury, he appeared disoriented, disengaged and disinterested in his job duties after the accident. For example, Mr. Boeing, who had used Petitioner as a resource to help transition flavors from the lab to the manufacturing plant, testified that after Petitioner's accident, he noticed a dramatic difference in his ability to create plausible hypotheses to assist in resolving manufacturing issues. Indeed, Petitioner began exhibiting what Mr. Boeing termed as an "evasive" attitude in response to pointed questions, leading others to believe that he was having trouble understanding the questions themselves. (App. 1302).

In an effort to encourage Petitioner to again engage in chemistry and resume his prior job duties, Respondent assigned Petitioner sets of defined tasks and provided him with direct supervision from several managers of the Research and Development team. Before his accident, Petitioner had often provided critiques and advice to other bench chemists. One of the first activities he was encouraged to resume was discussing projects and evaluating techniques with his former research assistant, Mr. Andy Lam. After a short time it was clear that Petitioner was unable to contribute to Mr. Lam's projects. Instead of assisting in Petitioner's recovery, the discussions simply served to irritate and frustrate Petitioner. Out of this frustration, Petitioner would become enraged at his colleagues and engage in disruptive behavior. (App. 1022).

Dr. Anthony J. Dennis, Respondent's Vice President of Research and Development, likewise noted Petitioner's cognitive deficiencies. Dr. Dennis recounted instances where he had the same conversation with Petitioner "over and over again." Additionally, Dr. Dennis testified that Petitioner's injuries had manifested themselves physically as well as

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3. Respondents were unaware of Dr. Tureen's report at the time Petitioner returned to work, and only discovered its existence during the course of litigation.

cognitively: "[I]t was very obvious that [Petitioner] was extremely unsteady on his feet and was having difficulty just getting around, . . ." (App. 1472). Another colleague, Dr. Robinson, echoed this conclusion by noting that "[Petitioner] would have to support himself on the walls as he was walking, because he couldn't really stand by himself very well for fear of falling." (App. 1573).

In December 1991, Petitioner fell while working in Respondent's laboratory. He did not return to work for two months until February, 1992. Initially, Petitioner was treated in the emergency room of a nearby hospital by Dr. James Lutz. Dr. Lutz continued to treat Petitioner after this initial visit. In January, 1992, Dr. Lutz agreed to sign a return to work letter restricting Petitioner to performing "alternative" duties in a "safe, controlled environment."

However, Petitioner did not immediately return to work. Instead, Petitioner waited an additional month, during which time Dr. Lutz conducted a follow-up evaluation of Petitioner's condition. Dr. Lutz modified Petitioner's work restrictions in February 1992, limiting Petitioner to working in a "supervised setting with non-dangerous chemicals until further evaluation." (App. 303). When Petitioner did return to work from his two-month paid disability leave, Respondent, in compliance with Dr. Lutz's second evaluation, limited Petitioner to performing non-laboratory duties. While Petitioner was still encouraged to perform theoretical chemistry, he was restricted from personally performing any laboratory work.

Upon his return to Tastemaker in February 1992 Petitioner was uncommunicative and distracted. He refused to participate in discussions with colleagues regarding pending experiments, and he even became argumentative on occasion when confronted with questions. (App. 1022). Based on the observations of Petitioner's supervisors and colleagues, Tastemaker became concerned that Petitioner would never be able to perform bench chemistry at his former level. In order to assist in his recovery, Tastemaker provided Petitioner with the time and opportunity to study organic chemistry in the hope that he could recapture the intellectual creativity that had been absent since his accident. He was relocated to an office in the Administrative Building of Tastemaker in close proximity to his friend and fellow chemist, Mr. Kenneth Strassburger. (App. 1610). Tastemaker did not apply any pressure upon

Petitioner to produce results during this period. Instead, Petitioner was provided with the support, time and encouragement of Tastemaker in the hopes that he would regain his pre-injury level of technical competence and creative problem solving ability.

Petitioner was given the opportunity to work for four months reacquainting himself with organic chemistry. Even after this four-month period of review, Petitioner continued to exhibit significant physical and cognitive problems. Despite the continued existence of these problems, Petitioner pleaded to return to the laboratory. In order to balance a desire to encourage Petitioner's recovery and a genuine concern for employee safety, Dr. Dennis issued a memorandum outlining a five-stage plan that had been developed to evaluate Petitioner's ability to resume his former laboratory work. The goal of Dr. Dennis's June 15, 1992 memorandum was to assist Petitioner in designing and safely completing experiments he could perform prior to his accident. (App. 307).

During the summer of 1992, Petitioner focused his efforts on completing the five steps outlined in Dr. Dennis's memorandum, so that he might return to the laboratory. The first four stages of the plan required the design of several organic synthesis pathways. While Petitioner was technically able to design the pathways, it was apparent to colleagues, Drs. Dennis and Robinson, that he was still suffering from residual effects of his brain injury, both mentally and physically. Dr. Robinson testified that Petitioner approached him several times a week to ask what he needed to do to return to the lab. Each time, Dr. Robinson would explain the five-stage plan, and Petitioner would seemingly leave satisfied, only to return the next day and ask again. (App. 1574).

Dr. Dennis testified that, with respect to the completion of the synthesis pathways, Petitioner was given a "passing grade," even though his responses were rote and there was a marked lack of the creativity and innovation that formerly distinguished his work:

> [I]n questioning [Petitioner] about the pathways, . . . we weren't seeing a lot of creativity. [Petitioner] had always been a very creative and innovative scientist. In these pathways, we weren't seeing that innovation. They were the kind of things [Petitioner] would repetitively talk about.

> So, while he had met the letter of what we had said, and laid out some synthesis pathways, they were pretty much by rote. But we wanted to encourage him, I specifically wanted him to keep going. So, we said, yeah, okay, we'll give you a passing grade on that, on having put those together. But, I did have reservations.

(App. 1485).

On August 20, 1992, Dr. Dennis wrote a follow-up memorandum to Petitioner suggesting that, based on his performance on the first four stages of the plan, he might more fully participate in the development of chemical synthesis research programs within Tastemaker. However, the memorandum also documented some of the concerns that Dr. Dennis had with Petitioner's physical ability to return to the laboratory:

> However, I remain seriously concerned about your abilities to physically handle experimentation in the laboratory in a safe fashion. . . . I observed occurrences of physical unsteadiness. My observations have been supported by others within the company. Your safety and the safety of our other employees is our paramount concern. As you know, the hazards in [the Organic Synthesis Lab] are substantial given the handling of toxic and explosive chemicals and potentially dangerous physical processes that require a steady hand and continuous monitoring. Because I believe your physical recovery requires more progress to ensure a safe work environment, ***I am not as yet authorizing you to physically perform your own experimentation*** . . . .

(App. 308) (emphasis added). In addition, the memorandum stated that Petitioner was to "maintain strict abstinence of the handling of chemical materials or experimental apparatus . . . until further notice."

Petitioner acknowledged in writing his receipt and acceptance of the conditions imposed by Dr. Dennis in the memorandum, and he was permitted to return to his office in the laboratory building in late August 1992. Despite repeated requests from Terri Bonar-Stewart, the Vice President of Human Relations, Tastemaker never received an unrestricted return to work letter for Petitioner. (App. 922). As a result of the concerns

of Drs. Dennis and Robinson, and because Petitioner was still subject to the work restrictions imposed by Dr. Lutz following his fall in Tastemaker's laboratory, Petitioner was strictly prohibited from personally performing any experiments.

In order to implement Petitioner's synthesis pathway designs, Tastemaker provided Petitioner with a lab assistant who could perform all of his hands-on laboratory work. (App. 1347). Also, at the request of Petitioner, Tastemaker paid for physical therapy in excess of the limitations imposed by Petitioner's medical insurance. (App. 308).

Although rehabilitative efforts continued, Petitioner had serious functional problems and refused to adhere to the restrictions placed upon his job duties. In May 1993, Petitioner became violent when observed going through the research files of his former lab assistant, Mr. Lam. Following this incident, Petitioner was warned that any further incidents of violent behavior could result in his termination. (App. 311).

At this point, it became clear to Tastemaker that a hazard assessment needed to be done with respect to Petitioner's ability to work in the laboratory. With the support and agreement of Petitioner, Dr. Ann Middaugh, an occupational medicine physician, was retained to evaluate Petitioner's physical and cognitive functional capacity as it related to his ability to perform his job within the laboratory environment. (App. 1358).

Dr. Middaugh made an initial on-site visit to Tastemaker to meet with Human Relations representatives, gather information, and observe Petitioner in the laboratory. In addition to the on-site visit, Dr. Middaugh also obtained a comprehensive medical and occupational history, and conducted physical, neurological and mental status screening examinations. After reviewing the results of these examinations, Dr. Middaugh recommended that Petitioner be examined by Dr. Edwin Barrett, a neuropsychologist. (App. 312). Dr. Barrett, in turn, performed a battery of tests designed to measure Petitioner's intelligence, attention, language, reasoning, memory and personality.

While awaiting Dr. Middaugh's report and opinion, Petitioner validated Tastemaker's fears that his cognitive and physical disabilities posed a safety risk to himself and to others. Although Petitioner had

received clear and repeated admonitions not to personally perform laboratory work, he defied these instructions. On April 29, 1993 Petitioner attempted to perform an experiment involving the use of volatile materials. (App. 313). The chemical involved in the experiment was explosive when mixed with air, and the presence of another agent, water, was essential to its safe use. While attempting to conduct the experiment, Petitioner forgot to turn on the reflux condenser water, which was critical to the safety of everyone in the laboratory. Fortunately, Petitioner's lab assistant discovered and quickly corrected the problem, averting the potential disaster. Clearly, the harm that could have resulted from Petitioner's oversight was substantial.

On May 4, 1993, just a few days after Petitioner's failed experiment, Tastemaker received Dr. Middaugh's written report outlining Petitioner's inability to function in his previous position:

> [T]he results of the March 31, 1993 examination show evidence of global brain damage involving both the right and left hemispheres. There was evidence of significant memory impairment, difficulty in judgment, impaired general thought and organizational processes and impairment in gait and station. The neuropsychologic testing confirms the abnormalities that surfaced on the screening evaluation. [Petitioner] is unable to retain and process new information and has severe memory deficits. . . . ***Overall there is diffuse brain damage which has resulted in serious abnormalities in memory, processing of new information, retention of same, and reasoning and judgment. These impairments are permanent.*** It is unlikely that there will be any significant improvement in the future, particularly given the time elapsed since the injury.

Dr. Middaugh further concluded:

> [T]he job of a bench research chemist involves careful sequencing of chemical reactions in a stepwise, methodical and reproducible manner. ***[Petitioner] is not capable of performing his previous job as a bench chemist in a reliable and safe manner. He would represent a serious safety risk***

> ***to himself, his co-workers and the surrounding environment.*** It is my recommendation that [Petitioner] be permanently restricted from any activities involving bench chemistry.

(App. 314) (emphasis added).

Dr. Barrett's report likewise evidenced a belief that it was unlikely that Petitioner would ever be able to return to his position as a bench chemist. Dr. Barrett confirmed that Petitioner's memory and learning ability had been effected by his head injury:

> [Petitioner] had difficulty benefiting from corrective feedback seemed [sic] to relate to his impaired memory processes. On memory testing, he showed low average recall/recognition of nonverbal materials, whereas he made limited progress when asked to learn and later recall/recognize verbal language materials. He was slow to acquire new information, and once learned, he showed a rapid rate of forgetting with some confabulation.

(App. 554). With respect to Petitioner's ability to return to his former position, Dr. Barrett concluded that "[i]n view of his cognitive deficits, I seriously question [whether] he can function as a bench chemist."

Based on its observation of Petitioner during the 20 months that he tried to resume his former position, the conclusions reached by Drs. Middaugh and Barrett, and Petitioner's flagrant disregard of his medically imposed work restrictions, Tastemaker determined that it was necessary for the safety of all involved to place Petitioner on a short-term disability leave of absence effective May 27, 1993. Throughout the duration of Petitioner's short-term disability leave, Tastemaker responded to his repeated requests to return to work by requiring that he provide a medical opinion that he was able to return to work safely. Petitioner was unable to provide Tastemaker with any such statement or opinion.

On November 23, 1993, Petitioner's short-term disability leave of absence was converted into a long-term disability leave facilitated by Tastemaker's long-term disability insurance carrier, UNUM Life Insurance Company ("UNUM"). In conjunction with the receipt of long-

term disability benefits, Petitioner was re-evaluated by Dr. Tureen in March 1994. Dr. Tureen's conclusion that Petitioner's cognitive abilities were unreliable was particularly instructive because he had examined Petitioner several times following his injury:[4]

> [w]hat emerges then is a certain unreliability of the cognitive system, when [Petitioner] cannot rely on over-learned skills and has to deal with situation which may be continuously changing and thus requiring continual adaptation particularly in novel problem solving situations. . . . ***there would be considerable concern, simply based on this test performance (and based upon past reports of neuropsychological performance) if [Petitioner] were to attempt to function as a bench chemist in potentially hazardous situation***. . . . Based on this particular evaluation, one could not confidently recommend [Petitioner] return to his former position as a bench chemist. It is thought that given the length of time, since the initial injury and the consistency of performance, based upon past reports, as well as the current evaluation, ***that [Petitioner's] deficits are permanent.***

(App. 321) (emphasis added). In 1994 Petitioner also applied for and received social security disability benefits.

At about the same time, UNUM attempted to conduct a job simulation that would be helpful to Petitioner in identifying and accepting his cognitive and physical limitations. UNUM contacted a vocational counselor, Ms. Donna Taylor, to arrange for a job simulation which could be used to assess Petitioner's abilities. Ms. Taylor repeatedly attempted to set up a simulation at the University of Cincinnati, which both UNUM and Ms. Taylor believed was the appropriate location for such a simulation. (App. 823).

Petitioner and his wife repeatedly objected to the idea of a controlled job simulation. As noted by Ms. Taylor, such objections ranged from

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4. Of all the physicians evaluating Petitioner's condition, Dr. Tureen had the best opportunity to observe Petitioner's progress over time. Dr. Tureen first evaluated Petitioner's condition while he was still hospitalized in 1991, and he continued to see him over the next several years.

Petitioner's statement that such an effort would be "ridiculous" as his position was too complicated to be simulated, to a complete refusal to discuss any alternative other than returning Petitioner to his former bench chemistry position.

When Petitioner demanded that he be permitted to conduct an on-site job performance evaluation, Tastemaker responded by stating that ***it would entertain the request so long as Petitioner provided a medical opinion that an on-site evaluation could be conducted safely***. (App. 925). Notes generated by UNUM representative Ms. Wendy Gimbel document her conversation with Ms. Bonar-Stewart of Tastemaker stating that Tastemaker was willing to do an on-site evaluation if Petitioner's doctor would state that he would not present a danger to himself or others. Unbelievably, after criticizing the job simulation proposal and demanding that he be permitted to conduct on-site job testing, Petitioner failed to provide the necessary medical certification that he was able to safely perform laboratory work, and thus his request to conduct such testing could not be acted upon by Tastemaker.

Rather than cooperate with UNUM's professional counselor, or provide medical certification to conduct on-site testing at Tastemaker, Petitioner took matters into his own hands and hired Dr. Hans Zimmer, an *emeritus* organic chemist at the University of Cincinnati, to evaluate his ability to return to his research bench chemist position. Petitioner's attempts to rely on Dr. Zimmer's evaluation as evidence of his ability to perform his job at Tastemaker in a safe manner are without merit. Dr. Zimmer proposed a single organic chemistry problem for Petitioner to solve that Dr. Zimmer deemed worthy of a Ph.D. level organic chemist. Dr. Zimmer did not actively supervise Petitioner's work. In fact, he was out of the country during the majority of the time Petitioner worked in his laboratory. (App. 1695). In addition, Dr. Zimmer admittedly knew nothing about Petitioner's position at Tastemaker, and he made no effort to familiarize himself with Petitioner's job description or projects. (App. 1689) Moreover, Dr. Zimmer advocated Petitioner's use of expired and otherwise unavailable chemicals to complete the experiment, which ultimately caused the experiment to fail. (App. 1687). Despite his lack of familiarity with the essential functions of Petitioner's position and his behavior in the laboratory, Dr. Zimmer authored an opinion that Petitioner was capable of "performing at a Ph.D. level in a lab and in obtaining background literature for high caliber chemical synthesis."

About the same time that Petitioner hired Dr. Zimmer to evaluate his organic chemistry skills, he received notice from UNUM that his long-term disability benefits would terminate effective November 23, 1995. UNUM had conducted a thorough evaluation of Petitioner and concluded that he was unable to resume his former position, but that he did possess transferable skills that would enable him to perform alternative functions in other workplace environments. (App. 329). Tastemaker, in the wake of the overwhelming amount of evidence supporting the conclusion that Petitioner was unable to resume his former position, terminated his employment. Tastemaker based its decision on: (1) its observations of Petitioner during the 20 month period that he returned to work; (2) his inability to comply with work restrictions; (3) numerous medical reports concluding that he suffered from cognitive system unreliability and memory deficits which were permanent; and (4) the determination of the insurance carrier, after conducting a thorough evaluation, that the Petitioner was unable to return to his former position as a research bench chemist. (App. 353).

In 1994, about a year after being placed on long-term disability leave, Petitioner had filed a Complaint in the United States District Court for the Southern District of Ohio alleging that Tastemaker had discriminated against him on the basis of his disability in violation of the ADA and Ohio Revised Code § 4112.02(A). Following extensive discovery, Tastemaker filed a Motion for Summary Judgment, stating that Petitioner had failed to establish a *prima facie* case of disability discrimination largely based upon his failure to present sufficient evidence that he was "otherwise qualified" to perform the essential functions of his research bench chemist position either with or without accommodation. The District Court granted Tastemaker's Summary Judgment Motion, holding that Petitioner failed to establish a *prima facie* disability discrimination case. The United States Court of Appeal for the Sixth Circuit affirmed the District Court's decision on April 3, 1998.

REASONS FOR DENYING THE WRIT

I.

THE PETITION FOR CERTIORARI SHOULD BE DENIED BECAUSE THE ISSUES RAISED BY PETITIONER ARE NOT APPROPRIATE FOR REVIEW BY THIS COURT.

The grant of a petition for a writ of certiorari is not a matter of right, but is a matter of judicial discretion. Sup. Ct. R. 10. Generally, a writ of certiorari will be granted "only for compelling reasons." *Id.* Rarely are petitions for a writ of certiorari deemed compelling when the "asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.*

Petitioner asserts that the Sixth Circuit Court Of Appeals erred finding that the ADA did not require an employer to accommodate a "regarded as" employee by providing particularized on-site testing of all essential job functions. Since Petitioner's argument hinges on a misapplication of the well-settled accommodation provisions of the ADA, he has failed to raise the type of compelling issue that might warrant the review of this Court.

A. The Petition for Writ of Certiorari Should Not Be Granted Because Petitioner's Argument Is Based Solely On A Misinterpretation Of The ADA's Accommodation Provisions.

Several of the issues of law and of fact decided by the Sixth Circuit in its judgment entered on April 3, 1998 are undisputed by Petitioner and Tastemaker. For instance, the parties agree that in order to state a *prima facie* case of disability discrimination, Petitioner had to offer proof of the following three elements: (1) he was an individual with a disability within the definition of the ADA; (2) he was "otherwise qualified" to perform the job requirements, with or without reasonable accommodation; and (3) he was discharged solely by reason of his handicap. *Monette v. Elec. Data Sys. Corp.*, 90 F.3d 1173, 1178 (6th Cir. 1996) *citing Maddox v. Univ. of Tenn.*, 62 F.3d 843, 846 (6th Cir. 1995).

At issue in this case was Petitioner's failure to prove the second element of his disability discrimination claim — that he was otherwise

qualified to perform the essential functions of his former position. The District Court originally held, and the Sixth Circuit affirmed, that Petitioner failed to introduce sufficient evidence that he was otherwise qualified to perform the essential functions of his position as a research bench chemist, and therefore, Tastemaker was entitled to summary judgment on Petitioner's disability discrimination and retaliation claims.

Petitioner does not dispute the accuracy of the statement of the law requiring Petitioner to bear the burden of proving that he was otherwise qualified. To quote the Petitioner:

> The Sixth Circuit also correctly ruled that Petitioner, . . . in order to establish a *prima facie* case of disability discrimination, must satisfy the burden of demonstrating that he is qualified to perform essential elements of his job with or without reasonable accommodation.

(Pet. 10), *citing Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876 (6th Cir. 1996).

Petitioner does not argue that the Sixth Circuit incorrectly applied the facts in evidence to the properly stated law. In fact, the Petition does not raise any question regarding the weight given to certain pieces of evidence by the Sixth Circuit, nor was there any question regarding the operation of inferences. Instead, recounting what he believes to be error, Petitioner presents a question for review that is anchored in a mischaracterization of the applicable law of accommodation under the ADA.

Petitioner argues that his brain injury did not result in any permanent cognitive or physical disability that would interfere with his ability to perform the essential functions of his job as a research bench chemist. As a result, this case has been characterized by Petitioner as one in which the employer has regarded or perceived an employee as being disabled, even though the employee's abilities to perform the job have not actually been impaired.[5]

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5. Tastemaker does not, at this time, address the propriety of characterizing this case as one involving an individual who is "regarded as" disabled, as opposed to actually disabled, because it is outside the scope of the question presented for review.

Therefore, Petitioner asserts that Tastemaker should have to "accommodate" him by permitting him to conduct particularized on-site testing to prove he can perform the essential functions of his bench chemist position. Although Petitioner was evaluated by numerous neurologists, neuropsychologists, and other medical professionals, he argues that the tests that they performed were not particularized for his former position, and that the "gross screening devices" employed by those evaluators were unreliable indicators of his ability to perform as a bench chemist. In support of this argument, Petitioner selectively includes references to on-site testing found within the reports of several professional evaluators.

Petitioner's argument that an employer has a duty to provide particularized on-site testing for each "regarded as" employee is erroneous and unsupported by case law. The Sixth Circuit so concluded in its Opinion in this matter. Petitioner incorrectly characterizes the question presented for review as one of accommodation, when clearly particularized on-site testing does not fall within the definition of an "accommodation" as that term is defined under the ADA.

1. The Sixth Circuit Correctly Concluded that Particularized On-Site Testing To Determine The Ability Of An Employee To Perform The Essential Functions Of The Job Is Not An Accommodation Under The ADA.

The term "reasonable accommodation," although not explicitly defined in the text of the ADA, is defined in the implementing regulations promulgated by the Equal Opportunity Employment Commission ("EEOC"). These regulations provide, in pertinent part, that a reasonable accommodation is an action that serves to enable an employee with a disability to perform the essential functions of his job:

> (1) The term reasonable accommodation means:
>
> (ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, ***that enable a*** qualified individual with a disability to perform the ***essential functions of that position***; . . .

29 C.F.R. § 1630.2(o)(1)(ii) (emphasis added). In other words, an accommodation is a means of assisting an otherwise qualified employee in fulfilling the essential functions of his position.

Both the text of the ADA and the implementing regulations provide lists of the types of actions that may be included within the definition of a reasonable accommodation. Although the lists are non-exhaustive, they bolster the conclusion that the purpose of an accommodation is to assist an employee in the performance of his essential job functions. For example, the following examples of reasonable accommodation are outlined in the text of 42 U.S.C. § 12111(9):

> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
>
> (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

See also 29 C.F.R. § 1620.2(o)(2). Both the definition and examples of "reasonable accommodations" support the finding that the purpose of the accommodation provisions of the ADA is to require employers to ***assist disabled employees in performing their jobs***.

The Sixth Circuit recognized this distinction and held that Petitioner's characterization of particularized on-site testing as an accommodation was "simply incorrect." Noting that the purpose of the accommodation requirement is to assist disabled employees in performing their jobs, the Sixth Circuit correctly held:

> Providing particularized testing of an employee's qualifications is simply not an accommodation under the ADA, because it does not serve to enable an employee to perform his job — it only helps to determine whether the employee is capable of performing his assigned tasks. Tastemaker was entitled to rely on its own chosen method of coming to the conclusion that [Petitioner] was not qualified; . . .

Since the Sixth Circuit decision was in accordance with the definition of an accommodation as a properly stated rule of law, this case does not present the type of compelling issue that would support the grant of a petition for certiorari.

2. The Cases Cited By Petitioner Do Not Strongly Suggest That Particularized On-Site Testing Would Be A Reasonable Accommodation.

Although recognizing that "no other court has ever squarely addressed or resolved [the] issue" of whether on the job testing is an effective accommodation for a regarded as disabled employee, Petitioner cites several cases that he believes "strongly suggest" that courts would find such an accommodation to be proper. (Pet. 15). These cases, however, are easily distinguished and do not provide any support for Petitioner's accommodation argument.

The first case cited by Petitioner is *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 94 L. Ed. 2d 307, 107 S. Ct. 1123 (1987). Petitioner argues that *Arline* provides support for the conclusion that there is some requirement on the part of employers to conduct an individualized inquiry into the employee's medical condition. This, however, misstates this Court's holding.

Arline involved a schoolteacher who suffered from chronic relapses of tuberculosis. Concerned about the contagious nature of her illness, the school board discharged the schoolteacher following her third relapse. This Court held that recurring contagious diseases could constitute a disability under the ADA. After determining that the schoolteacher was disabled, the Court addressed the issue of whether she was "otherwise qualified" to teach. In describing the inquiry necessary to determine if the schoolteacher was otherwise qualified, the Court explicitly stated that:

> ***[T]he district court will need to conduct an individualized inquiry and make appropriate findings of fact.*** Such an inquiry [by the court] is essential if [the statute] is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, . . .

Id. at 287 (emphasis added).

While Petitioner correctly notes that *Arline* required an individualized inquiry into the facts of the schoolteacher's illness, he fails to recognize that the inquiry was to be conducted by the district court, ***not the employer***. *Arline* stops short of placing an affirmative duty on the employer to determine the extent and risk of contracting a contagious disease.[6]

Petitioner also cites *Cook v. State of Rhode Island Dept. of Mental Health, Retardation & Hosps.*, 10 F.3d 17 (1st Cir. 1993) in support of his contention that an employer has a duty to accommodate a "regarded as" employee by permitting on-site particularized testing. Admitting that *Cook* does not address the issue of accommodation *per se*, Petitioner correctly states the holding of the case. However, Petitioner overlooks the fact that the court limited an employer's duty with respect to determining a "regarded as" employee's qualifications to a duty not to base such decisions on subjective beliefs and stereotypes.

The facts of *Cook* involved a public health entity's failure to rehire a morbidly obese nursing assistant. The employer's decision not to rehire the otherwise qualified woman was based on its perception that she would be ineffective in the position due to her excessive weight. Apparently, the nursing assistant had failed to obtain the requisite medical certification, and therefore the employer refused to re-hire her.

After affirming a jury's determination that the nursing assistant was regarded as disabled, the *Cook* court addressed the employer's duty with respect to determining an applicant's qualifications. The court held that

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6. Petitioner notes that the "otherwise qualified" inquiry in *Arline* involves two stages: (1) a medical inquiry stage; and (2) a reasonable accommodation stage. Interestingly, inconsistent with his other arguments, Petitioner states that particularized on-site testing falls within the medical inquiry stage, and not the accommodation stage:

> Whether [Petitioner] can perform his job turns on a initial medical inquiry of his performance in the laboratory which can only take place with the employer's cooperation. Once this takes place, the second inquiry would be whether the Petitioner needed an accommodation, and if so, what form that accommodation should take.

(Pet. 17).

an employer is not required to be unfailingly correct in its assessment of a person's qualifications for a particular job. However, an employer may not base its refusal to hire merely on an impermissible subjective belief that an individual is unable to perform the essential functions of the job. *Id.* at 26-27. Instead, an employer's belief that an individual is not qualified for a position must simply be based on some type of objective evidence. *See Southeastern Community College v. Davis*, 442 U.S. 397, 405, 60 L. Ed. 2d 980, 99 S. Ct. 2361 (1979) (holding that mere possession of a handicap is not a sufficient ground for assuming an inability to function within a certain context).

This same principle is echoed in two of the other cases cited by Petitioner in support of his claims. In *EEOC v. The Chrysler Corp.*, 917 F. Supp. 1164 (E.D. Mich. 1996), Chrysler refused to hire an applicant [who was diabetic] to fill a position as an electrician. Chrysler based its decision on three blood sugar tests performed by the company doctor. The court condemned the company's refusal to hire without performing a more thorough assessment of the individual employee's physical condition. *EEOC v. Texas Bus Line*, 923 F. Supp. 965 (S.D. Tex. 1996), reached the same conclusion. In that case, a bus company refused to hire an obese individual on the basis that she failed the company's very cursory medical exam. The court held that the company was required, prior to rejecting the applicant, to obtain some type of objective evidence on which to base its decision that the applicant was not qualified for the position.

Therefore, even if these cases are interpreted in their most favorable light, all that is required of an employer when evaluating the capabilities of a regarded as disabled employee is that it base its decision on his or her abilities on some type of objective evidence. These cases fall far short of requiring particularized on-site testing. Instead, they focus mainly on requiring an employer to objectively determine the medical and physical capabilities of an employee, so as to prevent an employer from basing its employment decision on myths or stereotypes.

In the present case, Tastemaker offered a "mountain" of objective evidence in support of its conclusion that Petitioner was not able to perform the essential functions of his job. Tastemaker "bent over backward in order to ascertain [Petitioner's] functional ability." It is undisputed that Tastemaker permitted Petition to return to work for a

period of 20 months. For portions of this time, Petitioner was permitted to work in the laboratory, at first on his own, and later with a lab assistant hired by Tastemaker.

Following a fall in the laboratory and the imposition of medical restrictions, Petitioner was banned from personally performing laboratory experiments. Due to Petitioner's frustration with these restrictions, Tastemaker developed a five-stage plan to determine Petitioner's ability to return to laboratory work. Although satisfactorily completing the first four stages, Petitioner was unable to demonstrate that he was physically able to return to the lab.

In order to assist in his further recovery, Tastemaker approved and paid for additional physical therapy for Petitioner beyond the limits of his insurance. An occupational medicine physician was hired, with Petitioner's approval, to evaluate his ability to function in a laboratory setting. This physician observed Petitioner in Tastemaker's laboratory, and conducted a thorough on-site evaluation and physical examination.

Petitioner later visited a neuropsychologist, who administered several written tests to gauge Petitioner's functional and cognitive abilities. Both physicians produced reports concluding that Petitioner was very likely unable to ever perform bench chemistry again, and opined that Petitioner's physical and cognitive disabilities were permanent.

While Petitioner was on short and long-term disability leave, he was given the opportunity to undergo a job simulation, which he refused to do. He was also evaluated by his former neurologist, who confirmed that Petitioner would no longer be able to perform bench chemistry, and stated that "there would be considerable concern, . . . if [Petitioner] were to attempt to function as a bench chemist in a potentially hazardous situation." Certainly, this evidence, collected over a period of three years, provided a sufficient objective basis supporting Tastemaker's belief that Petitioner was no longer able to perform the essential functions of his former position as a research bench chemist.

3. The Medical Evaluations That Petitioner Relies Upon, When Reviewed In Full, Support The Conclusion That Petitioner Was Not Otherwise Qualified To Resume His Position As a Research Bench Chemist.

Aside from case law, Petitioner also cites the written reports of several medical evaluators as providing objective support for the necessity of particularized on-site testing. However, when the medical evidence is reviewed in full, and all of the evaluators' opinions are considered, it is clear that each evaluator confirmed that Petitioner had sustained permanent cognitive deficits as a result of his accident, and was unable to perform the essential functions of his former position.

Petitioner references the report of Dr. Michael F. Hartings for the proposition that particularized on-site testing might be worthwhile in evaluating Petitioner's ability to perform bench chemistry. However, when Dr. Hartings prepared this report, he was unaware that such options had already been pursued. In fact, when Dr. Hartings mentioned the possibility of an on-site trial to the Petitioner and his wife, he noted that "[they] seemed to feel that that option has now been exhausted, and they are considering what course to follow from here." (App. 348).

Dr. Hartings also agreed with earlier evaluators that Petitioner was suffering from deficits in his "verbal/linguistic memory, and mild deficiencies in problem-solving and speed and efficiency of thinking." Spontaneous improvements in Petitioner's condition, according to Dr. Hartings, were unlikely to occur. As a result of his evaluation, Dr. Hartings concluded that "[Petitioner] is probably not capable of returning to his job as an active bench chemist . . ." (App. 348).

The evaluation performed by Dr. O'Dell, which Petitioner believes is "particularly authoritative" due to his position as the Director of Brain Injury Rehabilitation at the University of Cincinnati, agrees with the conclusions reached by the other evaluators. (Pet. 6). Dr. O'Dell diagnosed Petitioner as having a "traumatic brain injury manifested primarily by cognitive deficits." Although Dr. O'Dell believed that an on-site evaluation of Petitioner's capabilities was not "unreasonable," he suggested that it be done with a job coach or other qualified person supervising Petitioner's actions. It is unclear whether Dr. O'Dell, at the

time he authored his report, was aware that particularized on-site testing had already been performed. (App. 601).

Petitioner was also contacted by a Licensed Professional Counselor, Ms. Donna Taylor, who was hired by Tastemaker's Disability Insurer to evaluate Petitioner's skills and abilities. Although Petitioner represents that Ms. Taylor stated "that the preferred method of determining whether [Petitioner] had recovered from his brain injury to a point that he could resume his prior bench responsibilities" was a trial work period in respondent's own laboratory, review of Ms. Taylor's correspondence reveals that the on-site testing was simply one method of determining the extent of Petitioner's ability to perform the essential functions of his prior position. (Pet. 7).

In the alternative, Ms. Taylor suggested that a comprehensive head injury evaluation be conducted in which the cognitive demands of his occupation could be simulated. (App. 579). Ms. Taylor continued to pursue the job simulation option, contacting several local organic chemists who were qualified to provide an objective assessment of Petitioner's laboratory capabilities. Petitioner objected to any such job simulations conducted in outside laboratories, stating that such a simulation would be "ridiculous." Rather than participate in any UNUM-sponsored job simulation, Petitioner hired Dr. Hans Zimmer, a University of Cincinnati professor with a PhD in Chemistry, to conduct a private evaluation of his laboratory skills.

Ms. Taylor's correspondence clearly reflects her belief that Petitioner was unable to return to his position as a research bench chemist, which is confirmed by her continued recommendation that Petitioner receive long-term disability benefits. Despite Petitioner's expression of a desire to return to work, Ms. Taylor noted that his ability to perform the essential functions of the position, even with the aid of a laboratory assistant, was "questionable" based on her review of the medical and psychological reports contained in his file.

Therefore, while Petitioner is correct in stating that several medical evaluators suggested that on-site testing might have been helpful in confirming their belief that Petitioner could not return to bench chemistry, each evaluator nevertheless diagnosed Petitioner with significant cognitive

deficits that were unlikely to improve with the passage of time, resulting in his inability to function as a bench chemist.

B. The Petition For A Writ Of Certiorari Should Not Be Granted Because, Even If Particularized On-Site Testing Is Held To Be An Accommodation Under The ADA, Tastemaker Conducted Sufficient On-Site Testing Of Petitioner To Determine He Was Unable to Perform The Essential Functions Of His Job.

As the Sixth Circuit aptly stated, Tastemaker "bent over backward" to ascertain Petitioner's functional ability, and it based its termination of him on detailed information. Unlike the applicants in the "regarded as" disabled cases cited in the Petition, Petitioner enjoyed a period of 20 months during which time he was returned to his former position. He was able to work in the laboratory and use his former office for a significant portion of that time. Petitioner's former colleagues were able to observe his behavior in a work setting after his accident and provide Tastemaker with information about Petitioner's laboratory behavior.

After recognizing that Petitioner was experiencing residual physical and cognitive deficits as a result of his brain injury, Tastemaker tailored his workload to include the assignment of specific self-contained projects, and provided him with direct supervision from several members of the Research and Development team. Petitioner was encouraged to resume his routine of consulting with other chemists regarding their current research projects.

When it became apparent that Petitioner was not performing at his pre-injury level, Tastemaker provided Petitioner with the opportunity to review organic chemistry in a pressure-free environment, in the attempt to encourage Petitioner to recapture the intellectual creativity that had disappeared after his accident. After a four-month period of study, Petitioner requested the opportunity to return to performing laboratory work.

In an effort to assist Petitioner in a safe return to laboratory, Tastemaker designed a five-step program to evaluate his ability to safely perform laboratory work. When Petitioner was unable to complete the five stages satisfactorily, Tastemaker hired an outside occupational

medicine physician, Dr. Middaugh, to evaluate Petitioner's ability to function in his former position.

With Petitioner's consent, Dr. Middaugh visited Tastemaker and observed Petitioner's laboratory work. After conducting an on-site evaluation and a later examination, Dr. Middaugh consulted with Dr. Barrett, who then performed a number of neuropsychological tests on Petitioner. After reviewing all of the test results, Dr. Middaugh concluded that Petitioner was not capable of performing his previous job as a research bench chemist in a reliable and safe manner.

Petitioner was even given the opportunity to continue to work in Tastemaker's laboratory, albeit with a lab assistant. He was permitted to design and supervise laboratory experimentation, and was only restricted from personally performing the experiments himself. Although Tastemaker made every effort to assist Petitioner in his return to the laboratory, Petitioner breached Tastemaker's trust by personally performing laboratory work in flagrant violation of his work restrictions. While in the laboratory, Petitioner forgot to use one of the necessary safety devices, which could have had disastrous results.

Even while Petitioner was on disability leave, his ability to return to the laboratory continued to be evaluated. UNUM, Tastemaker's disability carrier, provided him with the services of a vocational counselor who attempted to set up a job simulation to evaluate Petitioner's laboratory skills. Although this was not particularized on-site testing, Petitioner refused to participate in the simulation, terming it "ridiculous" and demanded that he be permitted to return to Tastemaker.

Although Tastemaker was apprehensive about permitting Petitioner to perform experiments in its laboratory due to his prior failure to use all necessary safety devices, Tastemaker expressed its willingness to permit on-site particularized job testing of Petitioner, so long as he provided Tastemaker with a medical opinion that an on-site evaluation could be performed safely. Petitioner failed to provide any such medical authorization, so due to its concern for the safety of its employees, Tastemaker was unable to permit additional on-site job testing of Petitioner's laboratory skills.

Even if this Court were to decide that Tastemaker did have an obligation to permit particularized on-site testing of Petitioner, Tastemaker easily fulfilled any such requirement. Clearly the 20 month period during which Petitioner returned to work and was provided with a five-step plan to evaluate his ability to return to the laboratory, coupled with his actual return to laboratory work is sufficient particularized on-site testing for Tastemaker to evaluate Petitioner's ability to function within the laboratory environment. The evidence also shows that Tastemaker was willing to contribute to any job simulation efforts, and had even consented to perform additional on-site testing so long as Petitioner was able to provide a medical opinion that his performance of laboratory work would not present a danger to himself or others. Certainly, these actions constitute sufficient particularized on-site testing to satisfy any obligation of the employer to objectively evaluate Petitioner's skills and abilities in the laboratory.

CONCLUSION

The Sixth Circuit Court of Appeals decision affirms the District Court's grant of summary judgment based upon Petitioner's failure to establish that he was "otherwise qualified" to perform organic chemistry research and bench experimentation. The Petitioner does not seek the review of this Court on the basis that he was otherwise qualified, or that the Sixth Circuit erred in stating the applicable law or applying the law to the undisputed facts. Instead, Petitioner's argument rests squarely on a misapplication of the ADA's accommodation provisions. If Petitioner has failed to satisfy his burden with respect to being "otherwise qualified" and he does not contest the Sixth Circuit's decision on that issue, then this Court need not consider the accommodation issue.

With respect to the question presented, Petitioner mischaracterizes particularized on-site testing as an accommodation. Clearly, this characterization is incorrect. The EEOC implementing regulations expressly define an "accommodation" as a modification that "enable[s] a qualified individual with a disability to perform the essential functions of his position." There is nothing about particularized on-site testing that aides Petitioner in performing the essential functions of research bench chemistry. The case law cited by Petitioner is inapposite, and the medical reports, when considered in full, support the conclusion that Petitioner suffered from permanent cognitive impairments. The Sixth Circuit

reviewed these facts and the law in concluding that this was a "qualification" case and not an "accommodation" case. Even if this Court were to find that the Respondents were obligated to conduct particularized on-site testing, Respondent submits that its actions would have satisfied any such requirement.

For all of the reasons set forth above, Respondents respectfully request that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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